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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SACRAMENTO MUNICIPAL UTILITY DISTRICT, Plaintiff and Appellant, v. FCC CORPORATION formerly named FRU-CON CONSTRUCTION CORPORATION, Defendant and Appellant.	C064248 (Super. Ct. No. 05AS00862)

FCC Corporation, formerly named Fru-Con Construction Corporation (Fru-Con),[1] appeals from a judgment that awards approximately $54 million to the Sacramento Municipal Utility District (SMUD) for damages arising from the construction of the Cosumnes Power Plant. SMUD sought to build the power plant on a

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[1] Pursuant to stipulation of the parties, treated by this court as a "motion to modify case caption at this court," the case caption is modified to reflect defendant's current name. We refer to defendant as Fru-Con in the opinion based on its name during the time period relevant to this action.

fast-track schedule after experiencing a critical shortage of electricity in 2000. SMUD retained Utility Engineering Corporation (Utility Engineering) to provide the engineering design and Fru-Con to build the power plant.

Construction difficulties plagued the project, and Fru-Con missed a sufficient number of intermediate construction milestones to trigger the maximum liquidated damages rate of $25,000 per day. SMUD terminated Fru-Con's right to proceed with any further work after Fru-Con expressly refused to remove deficient concrete in the foundation for the power plant's cooling tower. By terminating Fru-Con's right to proceed, the practical effect of SMUD's action was to terminate the construction contract with Fru-Con.

Litigation ensued in state and federal court. In Sacramento County Superior Court, SMUD filed an action for declaratory relief, breach of contract, and statutory penalties under the False Claims Act (Gov. Code, § 12650 et seq.) against Fru-Con. Fru-Con filed a cross-complaint asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the implied warranty of correctness of plans and specifications, and breach of the statutory duty to make prompt payment.

The Sacramento County Superior Court granted SMUD's motion for summary adjudication, determining that Fru-Con had been properly terminated under the construction contract. A jury

trial culminated in an award to SMUD of more than $35 million in damages for the excess cost of the work above the contract price, nearly $6.6 million in liquidated damages for delay, and $10,000 in statutory penalties under the False Claims Act. The trial court awarded SMUD slightly more than $13 million in prejudgment interest and determined that Fru-Con was entitled to approximately $1.1 million in credits to avoid double counting of damages. The court denied SMUD's motion for contractual attorney fees on grounds that the construction contract did not include a fee-shifting clause.

On appeal, Fru-Con presents multiple arguments as to every component of the judgment against it.

The summary adjudication granted by the trial court is attacked by Fru-Con on grounds that (1) the entire construction contract could not be terminated for failure to perform a separable part, i.e., construction of section C of the cooling tower foundation, (2) triable issues of material fact existed regarding whether the section C concrete deficiency affected the power plant's final completion date, whether SMUD waived its right to terminate Fru-Con for the refusal to replace deficient concrete, and whether Fru-Con refused only to comply with the December 10, 2004, letter from SMUD, (3) the trial court erred in granting declaratory relief for purely retrospective conduct, and (4) summary adjudication improperly resolved only part of SMUD's declaratory relief claim in violation of

subdivision (f)(1) of Code of Civil Procedure section 437c (Section 437c).

Fru-Con alleges errors occurring at trial by arguing that (5) the trial court violated section 437c, subdivision (n)(3), by instructing the jury that summary adjudication had already established that Fru-Con breached the construction contract, (6) the court erroneously excluded evidence that SMUD failed to mitigate its damages by disallowing Fru-Con from completing the project, (7) the excess damages award held Fru-Con responsible for project design completeness and accuracy in violation of Public Contract Code section 1104 (Section 1104), (8) the trial court erred in denying Fru-Con's proposed instructions regarding the limited extent of its responsibilities as contractor for the construction project, and (9) insufficient evidence supported the excess cost damages award.

Fru-Con urges us to reverse the liquidated damages award (10) based on its contentions regarding summary adjudication and the applicability of section 1104, and (11) because the award constituted an illegal penalty.

Fru-Con contends the statutory penalty imposed under the False Claims Act must be reversed (12) due to insufficient evidence, and (13) because the trial court's denial of the motion to bifurcate trial on the False Claims Act cause of action prejudiced Fru-Con's right to a fair trial.

Finally, Fru-Con contends SMUD was not entitled to prejudgment interest (14) because damages were not ascertainable prior to trial.

SMUD also appeals, contending that the trial court erred in denying its motion for contractual attorney fees. Specifically, SMUD argues that the construction contract incorporated another related contract's attorney fee provision, and that Fru-Con was bound by its judicial admission that the construction contract allows recovery of attorney fees.

We affirm the judgment against Fru-Con. As we explain below, the trial court did not err in concluding that SMUD properly terminated Fru-Con for its refusal to remove and replace the deficient concrete in the cooling tower's foundation. Nonetheless, we conclude that the trial court erred in granting summary adjudication on the declaratory relief claim because the amount of damages could not be resolved as a matter of law. On this record, however, the error was harmless because Fru-Con's undisputed and unequivocal refusal to remove and replace the deficient concrete left no triable issue of fact regarding whether Fru-Con breached the construction contract.

Contrary to Fru-Con's claim, the evidence adduced during the three-month trial amply supports the jury's awards for excess cost damages, liquidated damages, and statutory penalties under the False Claims Act. We find no error in the challenged rulings by the trial court on evidentiary objections, refusal to

give Fru-Con's proposed jury instructions, or denial of the motion to bifurcate trial on the False Claims Act cause of action. We conclude that prejudgment interest was warranted because damages were readily calculable prior to trial.

As to SMUD's cross-appeal, we affirm the order denying SMUD's motion for contractual attorney fees. As SMUD's own pleadings established, the construction contract does not provide for attorney fees. And, the express language of the surety bond contract's fee-shifting provision renders it inapplicable to actions on the construction contract.

FACTUAL BACKGROUND

Impetus for the Cosumnes Power Plant

The evidence at trial shows that, in 2001, SMUD decided to build a new power plant after it had "just come out of the energy crisis time when . . . there was a whole lot of upheaval . . . in the electricity markets." SMUD's long-term power purchase agreements that had been signed when the nuclear power plant at Rancho Seco closed in 1999 were beginning to expire. SMUD determined that it needed to have the new power plant become operational by the summer of 2005. The timing of the power plant's completion was "[v]ery" important to SMUD.

SMUD's supervisor of engineering for power generation, Christopher Moffitt, testified: "It was of the utmost importance for SMUD to get this power plant built. When we are able to make power from our own resources, we are not subject to

the market volatility. In peak summer, the price that we would pay to make our own power is a fraction of what the peaking price is out on the market." Thus, the Cosumnes Power Plant was to be built on a fast-track schedule. SMUD's power plant construction expert, Robert Zanetti, testified that "a fast track [project] is generally a project that tries to get off on a quick start and generally you start construction when the engineering is not a hundred percent complete."

To comply with California clean air regulations, SMUD settled on an efficient combined-cycle natural gas power plant. A combined-cycle power plant generates electricity in each of two stages. The first, is "essentially just a jet engine coupled with a generator." In the second stage, the exhaust heat is captured and used to boil water for a steam turbine generator.

For the Cosumnes Power Plant, SMUD selected a site near its decommissioned Rancho Seco nuclear power plant and hired Utility Engineering to provide the engineering design work. While Utility Engineering worked on the engineering design for the power plant, SMUD began to secure the required governmental permits.

In November 2002, SMUD issued a request for proposal for the "civil and underground" portion of the power plant. In issuing a request for proposal, SMUD opted not to use an invitation for bid process.

With an invitation for bid, a public agency typically prepares a bid package containing all of the contract terms and conditions, with price as the only variable. Prospective contractors have no opportunity to negotiate over the scope of work or contract terms. By contrast, a request for proposal invites contractors to submit a proposal for which price is only one of the variables. Thus, "the proposer is allowed to take exception to terms and conditions, contract terms and conditions, to suggest alternatives to those contract terms and conditions and negotiate."

SMUD's initial request for proposal was later combined with a separate request for proposal to complete the remainder of the power plant project. The combined request for proposal consisted of "thousands and thousands" of pages. Prospective proposers were informed that the engineering design of the plant was only "approximately 85% complete." Thus, companies interested in submitting proposals were asked to "use your past experience and clearly state you[r] assumptions" in formulating a proposal to build the power plant.

Fru-Con's Proposal

At the time SMUD solicited proposals for the Cosumnes Power Plant, Fru-Con was wholly owned by Fru-Con Holding Corporation, which in turn was one of several hundred subsidiaries of Bilfinger Berger (Bilfinger), a stock-listed company in Germany. In March 2003, Fru-Con sought and obtained the approval from its

parent company to propose to build the power plant on a 24-month time schedule with a total price of $150 million. The "very detailed estimate" provided to Fru-Con's parent company anticipated a profit of $15 million from the project.

Fru-Con ultimately submitted to SMUD a proposal to build the power plant for $99.95 million with a scheduled completion within 17 months. This proposal received SMUD's highest overall evaluation based on all categories of consideration but the lowest technical evaluation based on Fru-Con's ability to construct the power plant. As part of its proposal, Fru-Con stated that its project director shall provide "Constructability Review: Evaluation of the means, methods, and sequence of construction intended to reduce the erection and installation times. The obvious outcome of this review is the reduction of construction costs and optimizing the construction schedule." Fru-Con also planned to provide "Claims Prevention Review" to "[d]evelop conceptual language designed to eliminate misunderstandings. Review designs and specifications to determine actual versus intended design." And, the proposal set forth a plan for "Quality Control" that promised: "[c]ontinuous inspections are conducted throughout construction with the results and required actions published. Work that is not in compliance with the contract specifications or quality assurance program is not accepted or included as work of earned value. *All nonconforming work is corrected at the earliest appropriate*

time and with no additional cost to the owner. Fru-Con will deliver a quality product." (Italics added.)

SMUD reiterated that the engineering design for the power plant was not yet complete. Colin Taylor, SMUD's project director for the Cosumnes Power Plant construction project, testified about the disclosure to Fru-Con regarding the completeness of the engineering design at the request for proposal stage:

"Q Mr. Taylor, did [SMUD] tell Fru-Con outright the engineering design is not yet complete on this project?

"A Absolutely. [Fru-Con] thoroughly understood that and this first section here explains it. It is understood the project design is not complete and therefore subject to further change by the parties. They understood full well."

Construction Contract

After several rounds of negotiations, SMUD reached an agreement that Fru-Con would build the power plant for $106.8 million and a 19-month construction schedule. At the time of the agreement, the engineering design was 90 percent complete for the power plant. SMUD's construction expert testified that, with 90 percent engineering design completion at the outset of power plant construction, "[t]his is a very unusual case of having engineering way out ahead of construction. I mean the engineering on this project is done to a much higher degree than on most projects. [¶] I've seen projects that have been in

construction for a year and are only 60 or 70 percent complete in engineering. So this project had an immense amount of engineering done way ahead of time." In 40 years of working in power plant engineering and construction, SMUD's expert had never come across a combined-cycle power plant that began construction with 100 percent complete engineering design.

With all incorporated attachments, the construction contract for the power plant comprises thousands of pages. However, the negotiated terms and conditions are primarily contained in the 57 "General Conditions" and 51 "Special Conditions" of the construction contract. Five of the general and special conditions are particularly pertinent to this case.

General Condition 24 of the construction contract is entitled, "Inspection," and provides in relevant part: "The Engineer or the Field Representative of the Engineer have the right to reject defective material and work. Rejected work shall be corrected and rejected material shall be replaced with proper material, to the satisfaction of the Engineer and without charge to [SMUD]. The Contractor shall promptly segregate and remove rejected material from the jobsite. If the Contractor fails to proceed at once with the replacement of rejected material or the correction of defective work [SMUD] may, by contract or otherwise, replace such material or correct such work and charge the cost thereof to the Contractor. Otherwise,

[SMUD] may exercise the remedies set forth under [General Condition] 36 [SMUD]'S RIGHT TO TERMINATE RIGHT TO PROCEED."

General Condition 32 of the contract is entitled, "Procedure for Protest" and provides: "If the Contractor considers any work demanded of it to be outside of the requirements of the Contract, or if Contractor considers any instruction, ruling, or decision of the Engineer, or Engineer's authorized representative, to be incorrect, Contractor shall within 10 calendar days after any such demand, instruction, ruling or decision is given, file a written protest with the Engineer. The written protest shall clearly state, in detail, Contractor's objections and reasons therefore. [¶] The Contractor shall make a reasonable attempt to resolve the protest with the Engineer. If the Engineer and Contractor are unable to resolve the protest, the Engineer will forward the protest to the Contracting Officer for a final decision. *Pending such final decision, the Contractor shall proceed with the work in accordance with the determination or instructions of the Engineer.* The Contracting Officer shall notify the Contractor of the decision in writing. The Contractor shall promptly comply with the decision, but shall retain the right to have the dispute resolved by a court of competent jurisdiction. [¶] Unless protests are made in the manner and within the time stated above, the Contractor shall be deemed to have waived all claims for extra work, damages, and extensions of time on

account of demands, instructions, rulings, and decisions of [SMUD]." (Italics added.)

General Condition 36 of the contract is entitled, "District's Right to Terminate Right to Proceed" and provides: "If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this Contract, or any extension thereof, or fails to complete said work within such time, the Contracting Officer may, by written notice to the Contractor, terminate Contractor's right to proceed with the work or such part of the work to which there has been delay. In such event, [SMUD] may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and Contractor's sureties shall be liable to [SMUD] for any excess cost occasioned [SMUD] thereby, and for liquidated damages for delay, as fixed in the Contract, until such reasonable time as may be required for the final completion of the work. If the Contractor's right to proceed is so terminated, [SMUD] may take possession of and utilize in completing the work, such materials, equipment, and plant as may be on the jobsite and necessary therefore."

General Condition 39, entitled, "Liquidated Damages," provides in pertinent part: "If the work under this Contract is not completed within the time set forth in SPECIAL CONDITIONS and any approved time extension thereof, damages will be

sustained by [SMUD]. Since it is impractical to ascertain and determine the actual damages [SMUD] will sustain by reason of such delay, the Contractor will pay to [SMUD] as fixed, agreed, and liquidated damages, and not as a penalty, the dollar amounts set forth in the SPECIAL CONDITIONS, per item, per day for every calendar day's delay in completing the work." The special conditions identified 15 construction milestones with a liquidated damages provision ranging from $5,000 to $10,000 per day of delay. Liquidated damages were capped at a cumulative maximum of $25,000 per calendar day.

Special Condition 35 provides, in pertinent part: "No deviations from the Design Engineer's drawings or specifications shall be made without prior approval from the Design Engineer or [SMUD]'s Project Director."

SMUD's construction contract with Fru-Con incorporated a performance bond. Fru-Con and Travelers Casualty and Surety Company of America (Travelers) signed a performance bond in favor of SMUD on the same day that Fru-Con signed the underlying construction contract for the power plant. The surety bond contained the following fee-shifting clause:

"Whenever Contractor shall be, and declared by Obligee [SMUD] to be in default under the Contract, the Owner having performed the Owner's obligations thereunder, the Surety may promptly remedy the default in any manner acceptable to the Obligee. In the event suit is brought upon this bond by the

Obligee and judgment is recovered, the Surety shall pay all costs incurred by the Obligee in such suit, including a reasonable attorney's fee to be fixed by the Court."

Under the construction contract, substantial completion of the power plant was to occur 573 days after SMUD issued full notice to proceed. On October 8, 2003, SMUD gave Fru-Con full notice to proceed. Thus, timely completion of the project should have occurred on May 3, 2005, and would have met SMUD's plan to have a new power generation plant online by summer 2005. Last-minute negotiations before the start of the project resulted in an adjusted contract price of $108,136,825.

Construction Progress Between October 2003 and September 2004

Construction problems plagued the project. Fru-Con encountered difficulties with foundation piles that were to provide the support for large pipe racks, leading to two months' delay in installation. The parties argued about problems with construction of the engineered pipe supports and standard pipe supports. Fru-Con also struggled in installing high energy piping and supports.

Fru-Con sought additional compensation for construction of pipe supports because it believed they were not within the scope of the construction contract. Fru-Con introduced testimony that approximately 5,200 engineering design drawings existed at the time it entered into the construction contract. During construction, Fru-Con received approximately 40,000 drawings

that had not been listed or included in SMUD's initial request for proposal documents. In particular, none of the engineered pipe support drawings existed at the time the parties entered into their contract. During construction, some drawings went through as many as eight revisions by Utility Engineering, and Fru-Con was never certain when it had received the final version. In some instances, the design "changed drastically." Fru-Con also complained of defective construction materials received from SMUD.

Approximately 6,242 cubic yards of concrete -- more than a third of all the concrete poured by Fru-Con -- failed to meet contract specifications. The large amount of deficient concrete frustrated SMUD's supervisor of engineering, but SMUD eventually accepted most of the deficient concrete.

Despite the problems, Fru-Con consistently issued monthly updates to SMUD, assuring it that construction was on track for completion on May 3, 2005. Fru-Con's construction team issued similar reports to its own executive management. Fru-Con's internal monthly assessments stated that the project was still profitable -- albeit not to the extent anticipated at the outset.

Section C Concrete

The cooling tower is a major component of the power plant, and consists of seven major segments and a pump pit. Portions of the concrete foundation are two and one-half feet thick. The

seven sections of the cooling tower are labeled A through G. Compressive strength testing of the concrete installed by Fru-Con in section C repeatedly showed that it failed to meet the technical specifications for the foundation.

Moffitt testified that the section C concrete "failed to measure up to the compressor strength requirements by a wide margin, and it had problems with the air entraining value." Moffitt further explained:

"Q Was that of significance given the use to which that foundation would be put?

"A Yes. My greatest concern was that this concrete would prematurely fail and create problems for the power plant over its life of thirty-five or more years. I was concerned that if we did not have better concrete in this section C, that it would be the beginnings or the source of failure of this foundation.

"Q Mr. Moffitt, can the [power plant] operate without the cooling tower?

"A No, sir, it cannot.

"Q And can the cooling tower operate without the cooling tower foundation?

"A No."

Fru-Con refused to replace the section C concrete and urged SMUD to accept the spreading of an epoxy sealant over the deficient concrete. SMUD's engineer determined that the epoxy proposal would require SMUD to engage in a costly reapplication

process every three to five years and that it would not retard cracks as effectively as the concrete specified for the section.

Utility Engineering informed SMUD: "Due to the type of service placed on the cooling tower basins, Utility Engineering specified Type V Cement along with a 28 day strength of 5,000 psi. [¶] The higher strength requirement is used to increase the durability and chemical resistance of the concrete. An additional benefit of higher strength requirement is a reduction of crack widths. This improves the water tightness of the basin. [¶] All cylinders broke from the section C pour average 1100 psi below the required strength. Missing the minimum strength requirement by 25% reduces the durability and chemical resistance of the concrete. Granted there are excellent coatings available, [but] their useful life is substantially less than the life of the cooling tower basin. The coating would have to be replaced somewhere around every three to five years at a significant cost to SMUD. [¶] Due to the limited life of any coating and having every break come out 25% low, I recommend the section be removed and replaced."

In a letter dated September 9, 2004, SMUD directed Fru-Con to submit a plan to replace the deficient concrete in section C. Fru-Con did not provide SMUD with a plan to replace the section C concrete.

Fru-Con Realizes its Problems with Project Profitability and Expected Completion Date

Peter Ophoven, a representative from Bilfinger, visited the construction site in September 2004. On September 28, 2004, Ophoven issued a report to Bilfinger headquarters that contained several sobering assessments. Ophoven anticipated that the completion date would be delayed by at least two months and that work "[s]lippages" were increasing. The report concluded that "[i]t is obvious that the slippage will continue to grow. . . . [¶] We think it is high time to develop, for internal purposes and as a basis to deal with the consequences of the delays, a realistic version of the program. It seems that completion will be late by a minimum of 2 if not by 4 months. Talking to the person in charge of the piping works[,] even this seems to be far too optimistic. [¶] We think the situation is very serious."

In the section entitled, "Design," Ophoven noted: "With the exception of some cable routing, FruCon [*sic*] has no design responsibility. All design is done by Utility Engineering on behalf of SMUD."

Rather than netting a $10 million profit as originally anticipated, Ophoven concluded that Fru-Con should expect a $6 million loss. He foresaw the possibility of even larger losses. Ophoven's report noted, "there are a number of items where half of the activity is completed but a tiny portion only of the budget is left to be spent. Other cases still are under the threshold for the linear projection but clearly show major

overruns to come." "In view of the considerable cost risks which we see and in view of the potential delays[,] we must expect the cash flow to rapidly deteriorate and turn negative." Ophoven also acknowledged, "Another problem is the quality of work. Up to a quarter of the welds fail."

Ophoven blamed some of the delays on severely adverse weather. Other evidence showed that SMUD did not grant any extensions of time to complete the project.

On October 7, 2004, Fru-Con's construction team informed SMUD for the first time that it was behind schedule in construction. That day, Fru-Con revised the anticipated completion date from May 3, 2005, to sometime between October 3, 2005, and December 23, 2005.

In December 2004, Fru-Con issued an internal report calculating that it would cost a total of $145 million to complete the power plant. A month later, Fru-Con calculated that it would cost approximately $138 million to complete the power plant. Fru-Con originally budgeted a $10 million profit into its contract price for the power plant project. By January 30, 2005, Fru-Con would again revise its estimated completion date to August 10, 2005.

Termination of Fru-Con's Right to Proceed under the Construction Contract

In a letter dated December 22, 2004, Fru-Con informed SMUD: "Fru-Con will not remove section C of the cooling tower foundation as directed by your above referenced letter [dated

December 10, 2004]. Such directive is inconsistent with the prior course of conduct between the parties, commercially unreasonable and motivated by claims made by Fru-Con against SMUD." Fru-Con asserted that "[t]here are viable alternatives to removal are [*sic*] available to SMUD." Fru-Con relied on the statement of its civil engineer that "there are remedial measures available to provide SMUD an 'or equal' from a durability perspective."

Not only did Fru-Con refuse SMUD's instruction to remove the section C concrete, but it also began construction of the cooling tower on top of the faulty foundation.

Chief executive officer of Fru-Con at the time, Matti Jaekel, testified during his deposition that Fru-Con never wavered from its refusal to replace the section C concrete:

"A We were telling SMUD that Fru-Con will not remove Section C of the cooling tower foundation as directed by their letter and that there were remedial measures available to provide 'or equal' from a durability perspective.

"Q Do you think SMUD, in receiving this letter would have any ambiguity in its mind as to whether or not Fru-Con would remove Section C?

"A I don't know what SMUD has in mind. They can read the language. It's plain English, and they can understand it. [¶] . . . [¶]

"Q To your knowledge, did Fru-Con ever agree to change its position from that stated in this letter of December 22, 2004 . . . ?

"A As far as I know, we did not change our position between December 22nd and February 11th."

Earl Hargrave, Fru-Con's project director, confirmed that "as of February 2nd, 2005, Fru-Con was not offering to remove the concrete in section C of the cooling tower."

Jaekel would later testify in a deposition that "I had considered [having Fru-Con] walking away with outside counsel and then determined that that was not a good option for us." Jaekel understood that Fru-Con faced maximum liquidated damages of $25,000 per day for missing project milestones. When the construction ran into serious difficulty, he had someone estimate the cost of delay to SMUD. According to Fru-Con's internal calculations, SMUD would lose approximately $130,000 each day that the power plant's completion was delayed based on $5.87 million lost in electricity generation every 45 days.

Handwritten notes made by Hargrave, during a meeting in January 2005 with Ophoven and Jaekel, recorded an intent to take several actions, including claims preparation, spending certain reserves, and checking piping codes. The seventh item on the list is: "Work slowly without being TERMINATED." The list continues with notations for "Reduction of work that FRUCON [*sic*] shouldn't be doing [¶] -- reduction of lab[or]. [¶]

redirect staff to Claims." The notes also list the following points: "1) More revenue. [¶] 2) Optimize the cash position. [¶] 3) Extension of time." The last page of the meeting notes reads in pertinent part: "Lawyer: Strategic -- to walk away. [¶] Claims + Lawyer: But preparation of these claims. [¶] Delay and Disruption."

SMUD terminated Fru-Con's right to proceed under the construction contract on February 11, 2005. SMUD's letter cited several reasons for the termination, including Fru-Con's refusal to replace the section C concrete.

SMUD hired a replacement contractor to remove and replace the section C concrete at a cost of $1,069,000. SMUD also hired other replacement contractors to complete the construction. The power plant was substantially completed in November 2005, at a total cost of $155,051,000 million to SMUD. The plant began commercial operation in February 2006.

Damages

Robert Dieterle, a certified cost engineer, testified on behalf of SMUD regarding the amount of damages (1) for excess costs above Fru-Con's contract price that were incurred to finish Fru-Con's portion of the work on the power plant, (2) the amount of liquidated damages accrued under the construction contract, (3) statutory penalties for Fru-Con's violations of the False Claims Act, and (4) the amount of prejudgment interest to which SMUD believed it was entitled. In ascertaining the

amount of damages, Dieterle expended nearly six months of full time effort. In doing so, Dieterle received approximately 500 hours of assistance from another certified cost engineer in his firm.

Excess Cost Damages

Dieterle investigated the costs incurred by SMUD to complete Fru-Con's scope of work under the construction contract. SMUD paid Fru-Con a total of $79,283,133. Thus, the unpaid portion of the construction contract amounted to $20,853,000. Dieterle credited this unpaid amount to Fru-Con. He concluded that SMUD incurred $46,914,000 in costs in excess of the amount that was remaining on the construction contract with Fru-Con.

Dieterle investigated whether the excess costs were reasonably necessary to complete Fru-Con's portion of the power plant's construction. He began by using Fru-Con's own internal monthly report from January 2005 in which it estimated that the total cost under the construction contract for the power plant would be $138 million. To this figure, Dieterle added $10 million because Fru-Con's original proposal incorporated an assumption that it would net a $10 million profit on the construction. The resulting $148 million figure -- comprising Fru-Con's job cost estimate plus expected profit margin and indirect overhead -- approximated SMUD's actual expenditure of

$155 million to Fru-Con and the replacement contractors for the completed power plant.

Dieterle noted that Fru-Con's estimate did not include the cost of mobilizing and demobilizing the replacement contractors or the costs necessary to repair some of Fru-Con's work. The costs of repair and rework were determined only after the replacement contractors began examining the work left to be done during the construction. For example, the rework included the cost necessary to replace the section C concrete -- an amount not included in Fru-Con's estimate because the company did not believe there was any need to replace the concrete.

Fru-Con's estimate also did not include costs caused by the delay of the power plant's estimated completion date of August 2005 to the actual completion date in November 2005. As Dieterle noted, "Everyday on a project a lot of money is being spent just associated with running a project." Fru-Con's own estimate of $50,000 per day for project delay cost was used for the three months that the plant was delayed beyond August 2005. Dieterle also accounted for the extra costs associated with the turbine manufacturer and Utility Engineering being required to be at the construction site during the delay period.

Fru-Con's earned hours report from February 6, 2005, indicated that the company spent 103 percent of the hours allotted for the project to complete only 66.4 percent of the work. Dieterle testified, "that information tells me the

project is in serious trouble. More specifically, that would be an indication to me that the project is sustaining up to that point a slightly more than fifty percent overrun on its budget."

In examining the excess costs, Dieterle used a spreadsheet of costs incurred by SMUD prepared by Brinig and Company. The information on the spreadsheet came from SMUD's books and records. Dieterle used the Brinig and Company spreadsheet as a starting point for making adjustments based on individual task orders submitted by the contractors and other project records. Dieterle also reviewed the task order contracts, the breakdown of cost codes, invoices, and "whatever other project record was available." Project records examined by Dieterle included the letters, debit memos, field memos, change order requests, and field directives. Dieterle wanted to ensure that only tasks and work falling within Fru-Con's scope were counted in determining the amount of excess cost damages.

Dieterle also investigated SMUD's cost codes, its system for tracking costs incurred on the construction project.[2] Thus, he was able to ascertain the amount of money SMUD paid to each

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[2] Nearly every major construction project employs cost codes, which allow for monitoring and analyzing expenditures on a project. The cost codes for the Cosumnes Power Plant were established by SMUD to track costs related to particular facets of the project. SMUD developed approximately 75 to 80 separate cost codes for the project -- of which 9 were determined to be outside the scope of work that Fru-Con was required to perform. In addition, SMUD kept track of individual invoices for materials and labor paid to the replacement contractors.

of its contractors, replacement contractors, and vendors. With extensive help from Zanetti, Dieterle identified nine of SMUD's eighty cost codes that described work outside the scope of Fru-Con's obligations under the construction contract. Dieterle explained that he and Zanetti "spread out all the information on a large conference table, drawings, specifications, field memos, field directives and whatever else was available. And we went through each and every change request, field memo and the like, reviewed what was entailed, discussed what was entailed, and came up with a conclusion based on his forty some years of experience and the requirements of this contract, what was in scope, and what was not in scope." By examining the actual invoices, Dieterle and Zanetti were able to correct miscoded costs. Nonetheless, as Dieterle concluded, "[t]his project was very well documented from an engineering standpoint."

As a result of his investigation, Dieterle was able to ascertain the amount due to Fru-Con for work it had performed prior to termination but that exceeded the scope of its duties under the construction contract. This amounted to a credit of $481,865 in Fru-Con's favor.

With the appropriate adjustments, Dieterle concluded that SMUD reasonably spent $155 million to complete the power plant. Dieterle noted that this amount was close to Fru-Con's internal estimate of what it would cost to complete the project. Dieterle testified that the time and materials mark-ups paid to

the replacement contractors were "not only reasonable" but "competitive." SMUD's post-termination construction costs were properly incurred to complete the power plant.

Liquidated Damages

Patricia Galloway, Ph.D., a civil engineer and management consultant, testified as an expert about Fru-Con's failure to achieve the intermediate construction milestones for which the construction contract imposed liquidated damages. In reaching her conclusions about Fru-Con's missed intermediate construction milestones, Dr. Galloway and her associates spent thousands of hours reviewing documents from the construction project.

Using Dr. Galloway's timeline of the delays incurred by Fru-Con, Dieterle calculated that SMUD was owed $8,195,000 in liquidated damages under the construction contract. The calculations incorporated the construction contract's cap of liquidated damages at $25,000 per calendar day. Dieterle also factored in time extensions of two days that Dr. Galloway indicated should have been granted to Fru-Con. Dieterle excluded any liquidated damages pertaining to the backfeed/energization milestone that was disputed by the parties. The exclusion resulted in an adjustment in Fru-Con's favor.

Statutory Penalties under the False Claims Act

Dieterle examined whether there was "any reasonable explanation why Fru-Con would submit a certified pay application

to a public agency when the work was not actually accomplished, at the time of the submittal of the payment application, if Fru-Con was honest in its billing when submitting an application to a public agency." Dieterle concluded that Fru-Con's billing practices were dishonest. As he explained, Fru-Con billed for work not yet completed and, when challenged by SMUD, had a practice of simply deleting the disputed part of the claim before resubmitting the bill. Dieterle added, "Fru-con never on its own revised a payment application. It did it in a direct response to SMUD." Based on his calculations, Dieterle concluded that SMUD was entitled to $152,879 in statutory damages under the False Claims Act.

Prejudgment Interest

Dieterle calculated prejudgment interest in favor of SMUD on the contract damages (which included excess cost and liquidated damages) at 10 percent simple interest. He concluded that SMUD was entitled to $15,732,053 in prejudgment interest through March 31, 2009.

In sum, Dieterle testified that damages due to SMUD from Fru-Con for excess costs, liquidated damages, false claim penalties, and interest totaled $62,843,514.

Verdict

The jury awarded SMUD $35,558,278 for excess costs that SMUD incurred in completing the power plant. On SMUD's claim for liquidated damages, the jury awarded $6,590,000. The jury

also awarded SMUD $10,000 under the False Claims Act. Fru-Con was credited with $1,496,449 for its requests for change orders. The court concluded that SMUD's damage calculation and evidence at trial had already given Fru-Con $333,740 for its request for change orders. To avoid double recovery for Fru-Con, the court reduced Fru-Con's credit for requested change orders to $1,164,709.

PROCEDURAL HISTORY

Proceedings in Sacramento County Superior Court

On February 28, 2005, SMUD filed a complaint against Fru-Con in Sacramento County Superior Court. The complaint alleged causes of action for declaratory relief, breach of contract, violations of the False Claims Act, and negligence.

Fru-Con filed a cross-complaint asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the implied warranty of correctness of plans and specifications, and breach of the statutory duty to make prompt payment.

Fru-Con removed the action to federal court on March 29, 2005. On May 26, 2005, the federal court granted SMUD's motion to remand the case back to the Sacramento County Superior Court.

Proceedings in the United States District Court

Fru-Con also filed an action against SMUD in federal court, entitled *Fru-Con v. Sacramento Municipal Utility Dist.*, U.S. District Court (E.D. Cal.) No. Civ. 2:05-CV-00583. SMUD filed a

counterclaim in the federal action filed by Fru-Con. The surety on the construction contract, Travelers, filed suit against SMUD concerning the performance bond in the United States District Court for the Eastern District of California. The two federal actions were eventually consolidated and stayed pending the outcome of this case.

Summary Adjudication

In Sacramento County Superior Court, SMUD moved for summary adjudication on its declaratory relief cause of action based on the claim that it had properly terminated Fru-Con's right to proceed with any further work. The trial court granted summary adjudication in favor of SMUD based on Fru-Con's refusal to replace the section C concrete as instructed.

Fru-con filed a petition for writ of mandate in this court, seeking to set aside the summary adjudication ruling. We summarily denied the petition. (*Fru-Con Construction Corporation v. Superior Court* (Aug. 2, 2007, C055837), review den. Sept. 25, 2007.)

Trial

The matter proceeded to a three-month jury trial. At the outset of trial, the court explained to the jury that SMUD properly had terminated Fru-Con's right to proceed with work under the construction contract, and that SMUD was entitled to present evidence of damages as provided in General Condition 36. SMUD was also allowed to introduce evidence to prove that Fru-

Con filed false claims. The court further explained that Fru-Con had its own claims that SMUD had breached the contract. Accordingly, Fru-Con was entitled to introduce evidence on that claim and the defense that SMUD had failed to mitigate its damages.

SMUD introduced evidence of damages arising from the need to pay replacement contractors after terminating Fru-Con's right to proceed under the contract, liquidated damages under the contract, statutory penalties under the False Claims Act, and statutory interest on the claimed damages.

Fru-Con adduced evidence in support of its claims for additional compensation due to extra work occasioned by engineering deficiencies and last-minute design changes for which SMUD and Utility Engineering were responsible.

Judgment and Appeal

Following the jury's verdict, Fru-Con moved for a new trial and for judgment notwithstanding the verdict. The trial court denied both of Fru-Con's motions. The trial court awarded SMUD $13,048,814.80 in prejudgment interest. However, the court denied SMUD's motion for attorney fees.

On December 7, 2009, judgment in the amount of $54,042,383.80 was entered in favor of SMUD and against Fru-Con.[3]

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[3] The judgment itself does not set forth the total recovery to SMUD but does contain the requisite components. The sum is derived from the court's statement that SMUD was entitled to

Fru-Con filed a notice of appeal on February 5, 2010. On February 25, 2010, SMUD filed its own notice of appeal from the portion of the judgment denying its motion for attorney fees.

DISCUSSION

APPEAL BY FRU-CON

I

Summary Adjudication

A.

Plaintiffs' Summary Adjudication Motions

As the California Supreme Court has noted, "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) A plaintiff may move for summary judgment/adjudication under subdivision (a) of section 437c.[4] (*Aguilar*, *supra*, at p. 843.)

$42,158,278 in damages, plus $13,048,814.80 in prejudgment interest, minus $1,164,709 in set offs to which Fru-Con was entitled.

[4] Section 437c provides, in pertinent part: "(p) For purposes of motions for summary judgment and summary adjudication: [¶] (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that

Summary adjudication may be granted on declaratory relief claims. (*Spencer v. Hibernia Bank* (1960) 186 Cal.App.2d 702, 712.)

"In moving for summary judgment, a 'plaintiff . . . has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (. . . § 437c, subd. (o) (1).)" (*Aguilar*, *supra*, 25 Cal.4th at p. 849.) "If the evidence is in conflict, the factual issues must be resolved by trial." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

Summary adjudication motions involve purely questions of law, and we review the trial court's determination of the motion

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cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

under the de novo standard of review. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) "In undertaking our independent review of the evidence submitted, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Ibid.*)

B.

SMUD's Motion for Summary Adjudication

SMUD's complaint alleged that it entered into a construction contract with Fru-Con, and that the contract allowed SMUD to terminate Fru-Con from the job if it "refuse[d] or fail[ed] to prosecute any or all work with such diligence as will insure completion of the work within the time specified in the Contract . . . ." SMUD further alleged that it had properly terminated Fru-Con's right to proceed under the contract after Fru-Con failed to meet construction milestones and "Fru-Con refused, in writing, [SMUD's] demand to remove and replace the defective concrete [foundation for the cooling tower] with concrete meeting Contract specifications." As a result, SMUD terminated Fru-Con's right to proceed under General Condition 36 of the construction contract.

SMUD moved for summary adjudication on its declaratory relief claim that it had properly terminated Fru-Con's right to proceed under the construction contract. In moving for summary adjudication, SMUD relied solely on Fru-Con's express refusal to replace the section C concrete. In support of the motion, SMUD introduced the construction contract, reports indicating that the section C concrete failed compressive strength tests and air entrainment requirements, the written notice of default regarding section C concrete that was given to Fru-Con, Fru-Con's letters in which it refused to replace the section C concrete, and SMUD's notice of termination of Fru-Con's right to continue work.

Fru-Con opposed summary adjudication on grounds that the section C concrete was not deficient, did not constitute a breach of the construction contract, did not provide grounds for terminating the entirety of the contract, and that SMUD waived its right to terminate Fru-Con. Fru-Con introduced evidence regarding section C concrete compressive strength, and deposition testimony indicating that Fru-Con attempted to negotiate an alternative to replacing the concrete. Fru-Con also reintroduced the letter in which it stated that "Fru-Con will not remove section C of the cooling tower foundation as directed by [SMUD]."

Fru-Con admitted "that in its September [*sic:* December] 22, 2004 letter that it would not remove the concrete . . . ." But

Fru-Con asserted that "[n]early five weeks after Fru-Con's December 22 letter . . . SMUD again expressed a willingness to consider alternatives to removal and replacement." Fru-Con also admitted that it "did not fulfill SMUD's request for a plan or schedule for removal and replacement of the section C Concrete . . . ." Instead, it asserted that it "did provide a plan for remediation of the concrete, which SMUD's engineer, [Utility Engineering], recognized as a 'solid proposal.'"

The trial court granted summary adjudication in favor of SMUD based on Fru-Con's undisputed refusal to replace the section C concrete. The court concluded that General Condition 36 authorized SMUD to terminate Fru-Con's right to proceed with the work on the power plant. The court found that the contract required construction of a cooling tower, comprised of concrete segments including section C. Each section of concrete was required to meet specific compressive strength requirements, and SMUD informed Fru-Con that section C concrete was not acceptable. Although directed to provide a plan for replacement of the concrete, Fru-Con refused to comply. Consequently, Fru-Con's breach of General Condition 36 entitled SMUD to terminate Fru-Con from performing any further work under the construction contract.

C.

Whether the Entire Contract Was Terminable for Failure to Perform a Separable Part

Fru-Con contends the trial court erred by granting summary adjudication because the entire construction contract could not be terminated for refusal to perform "a separable part" of the power plant construction. In specific, Fru-Con argues that the trial court's interpretation of General Condition 36 to allow SMUD to terminate the entirety of the construction contract for failure to perform a separable part violates Civil Code section 1442, which disfavors forfeitures of contracts. Thus, Fru-Con urges us to conclude that the separable part of the contract -- i.e., the section C concrete -- did not provide a basis for terminating it from performing other work on the power plant. We reject the argument.

1. Contract Interpretation

In assessing the meaning of General Condition 36, we employ familiar cannons of construction for terms of a contractual agreement. California law provides that "[t]he mutual intention of the contracting parties at the time the contract was formed governs. (Civ. Code, § 1636; *Palmer* [*v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109] 1115.) We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (Civ. Code, §§ 1639, 1647.) We

consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation. (*Id.*, § 1641.) We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (*Id.*, § 1644.) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (*Id.*, § 1638.)" (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245.)

Fru-Con does not contend that extrinsic evidence is necessary to discern the meaning of General Condition 36. Thus, the interpretation of the construction contract presents a question of law that we review de novo without deference to the trial court's construction of the agreement. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) We affirm the judgment if it reaches the correct result under any valid legal theory, regardless of whether the trial court's reasoning errs. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 776.) "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have

moved the trial court to its conclusion." (*Ibid.*, quoting *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

2. The Construction Contract

In granting summary adjudication on SMUD's declaratory relief claim, the trial court found: "It is undisputed that on December 22, 2004, Fru-Con again refused to remove the concrete in section C, a 'separable part' of the work, as directed by SMUD on several occasions. In other words, Fru-Con didn't demonstrate any diligence, let alone diligence 'as will insure' the project's completion."

The fatal flaw in Fru-Con's argument is the assumption that the section C concrete constituted a separable part of the construction contract or of the power plant itself. "Whether a contract is susceptible of division depends on its terms, the language employed, the subject matter covered, the nature and purpose of the agreement, its relation to other documents in the transaction and the intention of the parties as reflected in its terms [citations]." (*Reid v. Landon* (1958) 166 Cal.App.2d 476, 485.) Here, the contract had a single aim: the timely construction of the Cosumnes Power Plant.

The foundation of the plant's cooling tower was an integral part of the power plant's construction. This is not a case in which "the contract is divisible and separable, so that a full performance of one part may be made by both parties without affecting the subsequent performance, or right of performance,

as to the remainder, and a breach of that character occurs as to a part thus separable . . . ." (*Eldridge v. Burns* (1978) 76 Cal.App.3d 396, 410-411, quoting *San Diego Construction Co. v. Mannix* (1917) 175 Cal. 548, 553-554.) The section C concrete problems were not separate or divisible from other parts of the construction contract. As the trial court aptly noted, "Fru-Con does not suggest how the project could be completed within any time frame, let alone by May 2005, if it continued to refuse to remove Section C's concrete."

Murphy v. United States (1964) 164 Ct. Cl. 332 (*Murphy*), the case Fru-Con emphasizes in advancing its argument, illustrates how the section C concrete in this case was not a separable part of the construction contract. In *Murphy*, a contractor agreed to build a dam across the Pecos River for the United States Department of the Interior's Bureau of Reclamation (Bureau). (*Id.* at p. 334.) In addition to the dam's construction, the contract required the contractor to release approximately 20,000 acre-feet of irrigation water per month from another dam during the farming season that ran from March until September. (*Id.* at p. 335.) During construction, the Bureau became concerned about difficulties that the contractor was encountering in securing financing. (*Id.* at p. 336.) "[U]nconvinced that [the contractor] would be able to meet the oncoming *irrigation* deadlines, the first of which was but a

month away," the Bureau terminated the entirety of the contract. (*Id.* at p. 337, italics added.)

In terminating the contractor from the project, the Bureau relied on the following provision in the contract: "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, . . . the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise . . . ." (*Murphy, supra*, 164 Ct. Cl. at p. 334.) Following termination, the contractor's surety took over the work on the dam and completed the construction more than a month before the deadline specified in the construction contract. (*Murphy, supra*, 164 Ct. Cl. at p. 337.)

The contractor filed suit for breach of contract and the Court of Claims held that the Bureau did not have the right to terminate the entirety of the contract over concerns regarding the separable duty regarding distribution of irrigation water. (*Murphy, supra*, 164 Ct. Cl. at p. 337.) The *Murphy* court held that the Bureau's concerns about distribution of the irrigation water warranted termination of only that part of the contract relating to the release of irrigation waters because it was

"wholly separate from and incidental to" the construction of the dam." (*Id.* at p. 339.)

In contrast to *Murphy*, the concerns that lead to termination of the contractor from the job in this case were an indivisible part of the sole purpose of the construction contract. The construction of the foundation for the power plant's cooling tower is neither "separate from" nor "incidental to" the objective of the contract. The foundation for the cooling towers was included among the drawings provided by Utility Engineering to Fru-Con. Utility Engineering's drawings contained specifications for the concrete to be used for the cooling tower's foundation -- specifically, 5,000 pounds per square inch compressive strength measured at 28 days and air entrainment of four to six percent. The requirements for the concrete under the cooling tower were "[d]ue to the type of service cooling tower basins . . . ." Because a power plant requires a cooling tower, which in turn needs a foundation, the section C concrete was a necessary and integral part of the construction project.

The deficiency in the section C concrete meant that even with Fru-Con's epoxy-coating proposal, SMUD would have been required to keep remediating the problem in future years. Utility Engineering, SMUD's engineer of record, informed SMUD: "All cylinders broke from the section C pour average 1100 psi below the required strength. Missing the minimum strength

requirement by 25% reduces the durability and chemical resistance of the concrete. Granted there are excellent coatings available, their useful life is substantially less than the life of the cooling tower basin. The coating would have to be replaced somewhere around every three to five years at a significant cost to SMUD." The section C concrete problem did not constitute a separate or divisible part of Fru-Con's duties -- such as diversion of irrigation water from a different dam from the one being built under contract. (See *Murphy*, *supra*, 164 Ct. Cl. at pp. 334-335, 339.)

We also reject Fru-Con's reliance on Civil Code section 1442, which provides: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." As Fru-Con correctly points out, contractual forfeitures are not favored by the courts. It has long been settled that "'[a] forfeiture can be enforced only when there is "such a breach shown as it was the clear and manifest intention of the parties to provide for"' (*Randol v. Scott*, 110 Cal. 590, 595). 'The burden is upon the party claiming the forfeiture to show that such was the unmistakable intention of the instrument. If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so' (*Quatman v. McCray*, 128 Cal. 285, 289)." (*McNeece v. Wood* (1928) 204 Cal. 280, 284.) Immaterial variances in performance on a contract are disfavored as grounds warranting forfeiture of

rights under the agreement. (*Ballard v. MacCallum* (1940) 15 Cal.2d 439, 444.) Thus, courts strive to avoid contract interpretations that cancel an agreement based on a trivial breach of contract. (*Ibid.*)

Civil Code section 1442 offers Fru-Con no excuse from its refusal to perform an integral part of the construction contract. Fru-Con's steadfast unwillingness to correct the section C concrete constituted an express repudiation of the construction contract's terms, not an unintentional forfeiture. The refusal also ran afoul of General Condition 24's requirement that "[r]ejected work shall be corrected and rejected material shall be replaced with proper material, to the satisfaction of the Engineer and without charge to [SMUD]." That general condition expressly gave SMUD the right to terminate Fru-Con's right to proceed upon its refusal to remedy a deficiency. General Condition 36 reiterated SMUD's prerogative to terminate Fru-Con's right to proceed for express unwillingness to proceed with work required under the contract.

Fru-Con attempts to trivialize the section C concrete problem by asserting that it was a part of the project "valued at less than 1% of the Contract price." We are not persuaded. Innumerable components of a combined-cycle power plant are necessary to its proper functioning. Indeed, as we are reminded several times by Fru-Con, the power plant required thousands of drawings relating to many thousands of components. That the

section C concrete may not have been a large part of the overall cost of the plant does not undermine the importance of the specifications for the cooling tower foundation or the engineer of record's conclusion that failure to replace the deficient concrete would result in the need for SMUD to engage in expensive repairs every three to five years. The deficiency with the foundation of the cooling tower was not an immaterial part of Fru-Con's duties under the construction contract.

Although the trial court mistakenly accepted Fru-Con's assertion that the section C concrete installation was a separate part of the construction contract, the court correctly concluded on the undisputed facts that SMUD properly exercised its contractual right to terminate Fru-Con's right to proceed for its refusal to adhere to the technical specifications for the cooling tower's concrete foundation.

D.

Whether Triable Issues of Fact Precluded Summary Adjudication

Fru-Con argues that even if SMUD was entitled to terminate the entirety of the contract based on the refusal to replace the deficient section C concrete, triable issues of fact should nonetheless have been presented to the jury. Specifically, Fru-Con asserts that the jury should have decided (1) whether the refusal to replace the section C concrete affected the project's completion date, (2) whether SMUD waived its contractual right to demand that the section C concrete be replaced by concrete

that met contract specifications, and (3) "whether Fru-Con's refusal was only directed to the December 10 notice's 15-day deadline to remove the concrete."[5] (Italics omitted.) Although the headings in Fru-Con's opening brief list only the first two issues, Fru-Con raises a third issue regarding the December 10 notice in the text of its brief. For failure to properly present the argument under a separate heading, Fru-Con's buried contention is forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Roscoe* (2008) 169 Cal.App.4th 829, 840.)

1. Whether the Refusal Affected the Completion Date

Fru-Con contends that a triable issue of fact existed regarding whether the section C concrete deficiency adversely affected the completion date of the power plant. In so arguing, Fru-Con relies on authority for the proposition that a contractor's substantial compliance with a contract precludes a finding of breach of the agreement. (See *Smith v. Mathews Constr. Co.* (1919) 179 Cal. 797.) We reject the argument.

Fru-Con's argument is based on the unsupportable premise that SMUD could terminate performance only for defects that adversely affected the power plant's completion date. Fru-Con

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[5] Fru-Con's primary argument in opposition to the motion for summary adjudication presented to the trial court was that the section C concrete was not deficient under Utility Engineering's specifications. Fru-Con does not reiterate this argument on appeal.

reasons that the power plant could have been completed with remediation of the deficient concrete by epoxy sealant, even if the sealant would have to be reapplied every few years at SMUD's expense. This effort to create a triable issue is unavailing.

Nothing in the construction contract permitted Fru-Con to blatantly deviate from technical specifications for the plant so long as the completion date was not compromised. To the contrary, the construction contract required Fru-Con to follow the technical specifications for the power plant exactly. Indeed, the contract required Fru-Con to repair and replace any facet of the power plant regardless of whether it believed the construction was faulty. Fru-Con's remedy for unnecessary repairs or replacements outside the scope of work was an express term in the construction contract in which Fru-Con had the prerogative to submit claims for the extra work.

Given SMUD's contractual right to have the power plant built to the specifications provided by Utility Engineering, Fru-Con did not substantially perform by laying a deficient concrete foundation and then refusing to replace it. Fru-Con's refusal to comply with construction contract specifications for the section C concrete necessarily meant that it could not have completed the scope of work called for in the contract. Accordingly, no triable issue of fact existed regarding whether the refusal to replace the section C concrete adversely affected the completion date of the power plant.

2. Whether SMUD Waived the Right to Terminate Fru-Con's Right to Proceed under the Construction Contract

Fru-Con asserts that SMUD surrendered its right to terminate Fru-Con under General Condition 36 when SMUD considered proposals for section C concrete remediation that did not involve removal and replacement. We are not persuaded.

SMUD was not required to terminate Fru-Con's right to proceed immediately upon the learning of the deficient section C concrete. "A breach does not terminate a contract as a matter of course but is a ground for termination at the option of the injured party." (*Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 602.) "Even though the breach by one party is a repudiation of the contract or is otherwise so substantial as to discharge the other party from further duty, it is not necessary for him to seek a judicial remedy at once or to elect immediately among the remedies that may be available. If, however, his own conduct is such as to be operative as a waiver of condition, so that his own duty to continue performance is restored, his right to the remedy of restitution is suspended although he may still have a right of action for damages. Whether his conduct actually operates as a waiver may be a difficult problem. It is often reasonable for him to hope for a retraction of the repudiation or to expect that a defective performance will be cured by the other party. If his hope and expectation are not realized he may still treat the breach as a vital one and have the same choice of remedies as he had

originally." (*Crofoot Lumber, Inc. v. Thompson* (1958) 163 Cal.App.2d 324, 334.)

A non-breaching party to a contract can waive a breach by continuing to treat the contract as operative and thereby give up the right to hold the other party liable for damages. (*Kern Sunset Oil Co. v. Good Roads Oil Co*. (1931) 214 Cal. 435, 440.) Such a waiver, however, requires "the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only." (*Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 678.)

a. Express Waiver

Fru-Con seeks to show that SMUD's willingness to negotiate and consider alternatives to the replacement of the deficient concrete constituted an express waiver of the right to terminate Fru-Con's right to proceed under General Condition 36. In so arguing, Fru-Con relies on evidence of negotiations to which SMUD objected and the trial court excluded from evidence. Fru-Con contends that the evidence of the negotiations was admissible because Evidence Code section 1152[6] "only excludes

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[6] Evidence Code section 1152, subdivision (a), provides: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

evidence of settlement negotiations to prove 'liability for loss or damage.'" Fru-Con asserts that proof of SMUD's waiver of the right to terminate Fru-Con's right to proceed did not concern liability for loss or damage.

In arguing that SMUD expressly waived its contractual rights, Fru-Con relies on *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285 (*Warner*). In *Warner*, the California Supreme Court concluded that the trial court erred in admitting letters from the City of Los Angeles that contained statements that proposed compromises in its dispute with a contractor. (*Id.* at p. 289.) The contractor sued the city for breach of contract and fraudulent concealment of facts rendering construction of a road more difficult than anticipated. (*Id.* at pp. 289-291.) The trial court admitted, over objection, letters indicating that the city agreed to a compromise of contract specifications by bearing the additional cost of an alternative method of shoring up the road's foundation. (*Id.* at p. 296.) The Supreme Court held that the letters were inadmissible to show the City's liability for the additional cost, and explained: "We cannot accept [the contractor's] contention that the correspondence could properly have been admitted to show the contemporaneous and practical construction of the contract. We recognize, however, that the court could properly have admitted the evidence for the limited purpose of proving [the contractor's] bona fide and good faith efforts to reach an

agreement so that work could be resumed." (*Id.* at p. 296.) Fru-Con seizes on the last sentence to assert that SMUD's willingness to negotiate should have been admissible to prove a waiver of the right to terminate Fru-Con's right to proceed for breach of the specifications for the cooling tower foundation.

In *Warner, supra*, 2 Cal.3d at page 297, the city "put in issue the reasonableness of [the contractor's] delay of performance" under the contract. Consequently, the contractor was entitled to rebut the claim of unreasonable delay by showing that the contractor engaged in good-faith negotiations in order to facilitate resumption of the work. (*Id.* at pp. 297-298) Here, however, Fru-Con does not attempt to rely on the negotiations to excuse delay in removing and replacing the section C concrete. Instead, Fru-Con attempts to excuse its express refusal to comply with the contract based on the assertion that SMUD agreed to -- or at least considered -- alternatives for the remediation of section C. Thus, we find *Warner* inapposite.

Had SMUD waived its contractual right to have the section C concrete replaced, it would have surrendered its right to hold Fru-Con liable for damages arising from Fru-Con's repudiation. Moreover, SMUD would have been liable to Fru-Con for breach of contract arising out of the February 11, 2005, termination of the right to proceed. *Warner, supra,* 2 Cal.3d 285 does not help Fru-Con escape from Evidence Code section 1152's prohibition on

the introduction of negotiations to prove which party breached the construction contract in this case.

SMUD had the prerogative to await response from Fru-Con as to whether it would replace the deficient concrete. (*Crofoot Lumber, Inc. v. Thompson, supra,* 163 Cal.App.2d at p. 334.) SMUD also had a reasonable time within which to try to convince Fru-Con to reconsider its flat refusal to comply with the directive to replace the concrete. (*Ibid.*)

The trial court did not err in excluding evidence of negotiations regarding alternatives to replacement of the section C concrete.

b. Implicit Waiver

Fru-Con also argues that SMUD's negotiations constituted an implicit waiver of the right to terminate under the construction contract. Indeed, a waiver of contractual rights may be implied by a party's conduct. But an implied waiver requires "conduct indicating an intent to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) SMUD's default letter and the subsequent negotiations sought to convince Fru-Con to replace the section C concrete. SMUD never acquiesced to accepting a coating on the section C concrete as a substitute for replacement of the deficient concrete. SMUD's attempt to negotiate with Fru-Con over the course of several weeks did not constitute an intentional relinquishment of its right to terminate Fru-Con's right to proceed under General Condition 36.

(*Old Republic Ins. Co. v. FSR Brokerage, Inc.*, *supra*, 80 Cal.App.4th at p. 678.)

In sum, SMUD did not expressly or implicitly waive its right to terminate Fru-Con's right to proceed under General Condition 36 after Fru-Con refused to replace the concrete.

3. Whether Fru-Con Refused to Remove the Section C Concrete

Fru-Con contends that the jury should have been allowed to consider whether Fru-Con actually refused to remove the section C concrete. We disagree.

Fru-Con's assertion that the issue of refusal should have been considered by the jury ignores the unequivocal nature of its refusal to remove the section C concrete. The undisputed evidence showed that SMUD issued four written directives to Fru-Con to remove and replace the section C concrete. Not once did Fru-Con respond that it would comply with the directives. Specifically, the evidence introduced in support of summary adjudication showed the following:

On September 9, 2004, SMUD wrote to Fru-Con to state: "Testing of concrete in section C of the cooling tower basin has not shown acceptable concrete. Per spec 03300 section 3.6 J states that 'if core results fail before the design strength specified, concrete represented by the weaker strength samples shall be removed and replaced.' [¶] The above noted concrete is not acceptable to SMUD, please submit a plan to replace unacceptable concrete in the cooling tower." Again, on

September 29, 2004, SMUD informed Fru-Con: "Utility Engineering has reviewed the test results and documentation for the concrete in Cooling Tower basin section C. [Utility Engineering]'s recommendation is to remove and replace this section of the cooling tower concrete basin. SMUD concurs and requests Fru-Con to provide a schedule for demolition and replacement of [the] concrete."

Fru-Con took no action in response to either of the September 2004 letters to formulate a schedule or otherwise prepare to remove the deficient concrete.

On December 10, 2004, SMUD transmitted to Fru-Con a notice of default on the construction contract. In pertinent part, the notice stated: "Fru-Con is hereby instructed to rectify its failure to perform the Contract by following the Engineer of Record's recommendation to remove section C of the cooling tower foundation, and replace the deficient concrete with material that meets the specified requirements of the Contract. Fru-Con is reminded that [Special Condition] 14.5 requires Fru-Con to remedy this failure to perform the Contract within fifteen (15) days after the receipt of this letter, and that Fru-Con's failure to do so will result in the suspension of all further payments otherwise due to be made to Fru-Con under the Contract until this failure is rectified."

Fru-Con responded by refusing to comply with SMUD's instruction. On December 22, 2004, Fru-Con informed SMUD:

"Fru-Con will not remove section C of the cooling tower foundation as directed by your above referenced letter [dated December 10, 2004]."

In a February 4, 2005, letter, SMUD acknowledged that it had received a "repair proposal . . . belatedly offered by Fru-Con as an alternative to the requirement that Fru-Con remove the defective portion of the section C concrete . . . ." SMUD noted that it had reviewed the proposal, but rejected it as unacceptable. SMUD's letter concluded: "To date, Fru-Con has failed to follow the recommendation of the Engineer of Record, and has constructed the cooling tower despite the material deficiency with respect to the cooling tower foundation. Accordingly, Fru-Con is in default of its obligations under the Contract . . . ."

SMUD introduced the deposition testimony of Fru-Con's chief executive officer in which he confirmed that Fru-Con never wavered from its refusal between December 22, 2004, and February 11, 2005 -- the date on which SMUD terminated Fru-Con's right to proceed under the contract.

Fru-Con's focus on the December 10, 2004, letter from SMUD takes a myopic view of the parties' communications regarding the section C concrete deficiencies. By the time of the December 10 letter, three months had already elapsed since SMUD first instructed Fru-Con to replace the section C concrete. Fru-Con's characterization of SMUD's September letters as mere requests to

provide scheduling attempts to infuse them with a meaning their language cannot bear. Both the September 9 and 29, 2004, letters clearly instructed Fru-Con to begin taking steps to remove the deficient concrete. That SMUD wished to receive a schedule for the work does not negate the mandatory nature of the written requirement to remedy a deficiency that SMUD found unacceptable and at odds with contract specifications.

Even if Fru-Con's contention regarding the 15-day period were properly presented, we would reach the same conclusion. Fru-Con's focus on the reasonableness of the timeline for replacement specified in the December 10, 2004, letter ignores the fact that Fru-Con flatly refused to engage in replacement. This is not a case in which Fru-Con attempted to comply with the contract specifications by replacing the concrete but simply ran out of time. Fru-Con did not refuse for lack of time but on grounds that replacement was "inconsistent with the prior course of conduct of the parties, commercially unreasonable and motivated by claims made by Fru-Con against SMUD." Fru-Con's repudiation of its duty to ensure that the section C concrete met contract specifications had nothing to do with the 15-day deadline imposed by the December 10 letter issued by SMUD. Thus, there was no triable issue of fact concerning whether the time period for replacement imposed by SMUD was commercially unreasonable.

E.

Whether SMUD's Declaratory Relief Claim Was for Only Past Conduct

Fru-Con contends the trial court erred in granting SMUD's motion for summary adjudication because the declaratory relief claim related only to past conduct. We disagree.

A party to a contract may file an action under Code of Civil Procedure section 1060[7] to secure a judicial declaration of rights and duties under a contract. A party may seek declaratory relief even in the absence of an actual breach of contract so long as an actual controversy exists. (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647.) Thus, section 1060 offers parties a means by which they can ensure that their future conduct conforms with the terms of the contract. (*Meyer, supra,* 45 Cal.4th at pp. 647–648.) The *Meyer*

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[7] Code of Civil Procedure section 1060 provides, in pertinent part: "Any person . . . under a contract . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

court cautioned that section 1060 "must be read together with section 1061, which states: 'The court may refuse to [grant declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances.' (Code Civ. Proc., § 1061.)" (*Meyer, supra,* at p. 647.)

When a declaratory relief claim relates solely to past conduct between parties who have no continuing relationship, the trial court may abuse its discretion in failing to dismiss the claim. As our high court has noted, "The purpose of a judicial declaration of rights in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach. '(D)eclaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.'" (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848, quoting *Travers v. Louden* (1967) 254 Cal.App.2d 926, 931 (*Travers*).)

In *Travers,* the Court of Appeal affirmed the trial court's dismissal of a declaratory relief claim that "merely allege[d] a breach of the contract as a foundation for some unspecified claim of a right to redress" without any effect on the future conduct of the parties. (*Travers, supra,* 254 Cal.App.2d at

p. 929.) The *Travers* court noted that no uncertainty as to the meaning of any contract term had been alleged. (*Ibid.*) *Travers* concluded that the trial court would have abused its discretion by setting the declaratory relief claim for trial. (*Id.* at p. 932.)

Fru-Con relies on *Travers* to assert that the trial court in this case lacked discretion to grant summary adjudication on a declaratory relief claim relating solely to past conduct. Fru-Con does not argue that the trial court had discretion to grant declaratory relief and abused its discretion. Instead, Fru-Con argues that the trial court lacked any discretion to grant declaratory relief on SMUD's claim. Accordingly, we apply the de novo standard of review in examining whether the trial court had power under Code of Civil Procedure sections 1060 and 1061 to adjudicate the declaratory relief claim in SMUD's complaint. (*County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 668.)

The issue of whether a trial court has power to grant declaratory relief on a claim premised only on past conduct was examined in depth in *Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 367 (*Osseous*). The *Osseous* court undertook a survey of California law and found *Travers, supra,* 254 Cal.App.2d 926 to be the only reported decision holding that a trial court lacks discretion to issue declaratory relief on a claim relating to past conduct

alone. (*Osseous*, at pp. 366-367.) Because *Travers* involved a "plaintiff who failed miserably in framing the pleadings," the *Osseous* court stated that "authority for the proposition that a trial court abuses its discretion by refusing to dismiss a declaratory relief claim because the claim amounts to a backward-looking breach of contract claim is underwhelming." (*Osseous, supra,* at pp. 367-368.)

We need not resolve the question of whether the Supreme Court's quotation with approval of *Travers, supra,* 254 Cal.App.2d 926 undermines *Osseous*'s conclusion that declaratory relief is probably available even in instances in which it focuses exclusively on past conduct. (Compare *Babb v. Superior Court*, *supra*, 3 Cal.3d at p. 848 with *Osseous*, *supra*, 191 Cal.App.4th at pp. 366-368.)

Declaratory relief *is* properly granted when a party does not otherwise have an adequate remedy at law. "A lawsuit for breach of contract is neither as speedy and adequate nor as well suited as declaratory relief to the plaintiff's needs where . . . the use of declaratory relief will avoid a multiplicity of suits that may ensue if a different remedy is pursued. (*California Bank v. Diamond*, 144 Cal.App.2d 387; see also *Bridges v. Cal-Pacific Leasing Co*., 16 Cal.App.3d 118, 127)." (*Warren v. Kaiser Foundation Health Plan, Inc.* (1975) 47 Cal.App.3d 678, 683-684.) Declaratory relief is also available when the parties have an ongoing relationship. (*Osseous, supra,*

191 Cal.App.4th at p. 375.) In this case, there were both a continuing relationship between the parties and the potential to resolve collateral federal litigation.

At the time that SMUD filed its complaint with declaratory relief and breach of contract claims, the parties had a continuing relationship. The parties' continuing relationship pertained to the same project from which the declaratory relief claim arose. SMUD ultimately paid Fru-Con $185,000 for the work completed during the time that the declaratory relief claim was pending. Moreover, the parties continued to sort out numerous requests for change orders submitted by Fru-Con until September 2006 -- more than a year and a half after SMUD filed its complaint in the Sacramento County Superior Court. Testimony at trial also established that "[a]fter the termination Fru-Con was requested to come back and perform these [boiler] welds." SMUD and Fru-Con actually "entered into a separate contract for the work that Fru-Con was going to do" to complete the boiler welds.

The declaratory relief action was also pending at a time when collateral federal litigation focused on rights and obligations of the parties under the same construction contract. (See *Fru-Con v. Sacramento Municipal Utility Dist.*, *supra*, No. Civ. 2:05-CV-00583.) In seeking declaratory relief, SMUD did not name the surety, Travelers, as a party to this action even though SMUD believed that Travelers had conducted a bogus investigation of the insurance claim. Travelers' subsequent law

suit against SMUD in federal court was eventually consolidated with Fru-Con's action against SMUD. Consequently, the declaratory relief action in this case had the potential to inform the outcome of collateral federal litigation.

As the United States Supreme Court has explained, there are principles "which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 96 L.Ed. 200, 203 (1952)." (*Colorado River Water Conservation Dist. v. U.S.* (1976) 424 U.S. 800, 817, [47 L.Ed.2d 483].) Consistent with *Colorado River*, the judgment in this case prompted the federal court to issue a stay in the collateral proceeding filed by Fru-Con in the Eastern District of the United States District Court.

In granting the stay, the United States District Court explained: "SMUD previously moved to stay this action pursuant to *Colorado River Water Conservation Dist v. United States*, 424 U.S. 800 (1976). On August 11, 2005, the court denied SMUD's motion, although with the caveat 'in light of the concern regarding piecemeal litigation, this order is without prejudice to renewal should the scope of the state court action change significantly.' . . . While the court has not issued a formal

stay since that time, a *de facto* stay has been in place for roughly eighteen months. In that interim, the state proceeding went to trial, and on June 8, 2009, the jury returned a verdict in favor of SMUD. The court now formally stays the matter pursuant to *Colorado River*." Indeed, this court granted SMUD's motion for calendar preference for this appeal due to the potential collateral effect of our decision on the stayed federal action.

Had the trial court in this case declared that SMUD wrongfully terminated Fru-Con from proceeding with the work, Travelers might have secured relief in the federal action premised on the lack of breach by Fru-Con. (See *Mahaffey v. Bechtel Associates Professional Corp., D.C.* (D.C. Cir. 1983) 699 F.2d 545, 546-547.) Similarly, Fru-Con might have used a finding of breach by SMUD to bolster or even conclusively prevail on its federal court action against SMUD. (*Ibid.*) For this reason, the declaratory relief claim in this case had collateral consequences that rendered it within the discretion of the trial court to adjudicate. (*Warren v. Kaiser Foundation Health Plan, Inc., supra,* 47 Cal.App.3d at pp. 683-684.)

In sum, the trial court had discretion to adjudicate SMUD's declaratory relief claim because the parties had an ongoing relationship in that they continued to work together on the power plant and the declaratory relief ruling had the potential to resolve collateral federal litigation.

F.

Whether Summary Adjudication Disposed of Only Part of SMUD's Claim

Fru-Con argues that "SMUD's declaratory relief claim was also improper because it sought, in effect, an adjudication of *part* of SMUD's second cause of action for breach of contract." Fru-Con thus contends the summary adjudication ruling violated section 437c by resolving only the issue of the termination's propriety when the issue of damages remained to be tried. We agree that the trial court erred in granting summary adjudication. However, under the circumstances of this case, the error was harmless.

1. SMUD's Summary Adjudication Motion

SMUD's first cause of action sought a declaration that SMUD properly terminated Fru-Con's right to proceed after Fru-Con refused to perform work required by the construction contract. SMUD further requested that the declaratory relief include a determination of "the rights and liabilities of the parties with respect to the matters of controversy alleged above, including liquidated damages and other damages." SMUD's cause of action for breach of contract incorporated the allegations on which the declaratory relief claim was based and further asserted that "Fru-Con has breached the Contract by failing to adhere to its terms . . . ."

SMUD moved for summary adjudication only as to the declaratory relief claim. Fru-Con opposed the motion. At the hearing on the motion, Fru-Con for the first time argued that summary adjudication could not be granted as requested by SMUD because it would not dispose of the entire declaratory relief claim.

The trial court granted summary judgment and rejected Fru-Con's argument regarding incomplete disposition of the claim as follows: "In the first cause of action, for declaratory relief, SMUD alleged 'an actual controversy . . . relating to the legal rights and duties of the respective parties with respect to the contract.' As a result of that controversy, SMUD sought a judicial determination 'that it properly terminated Fru-Con's right to proceed with the work under the provisions of General Condition-36 of the Contract, and is entitled to any excess costs incurred by [SMUD] in the completion of the work, to liquidated damages for delay as provided in the Contract and for other damages as a result of Fru-Con's breach of the Contract.' [Citation.] In its motion, SMUD presented evidence of Fru-Con's refusal to remove section C, sufficient to invoke [General Condition] 36, and sufficient to shift to Fru-Con the burden of demonstrating a triable issue of material fact. Fru-Con failed to meet its burden; therefore the Court grants plaintiff's motion. That SMUD may have had other disputes with Fru-Con besides the one concerning section C, that SMUD did not raise in

its motion, does not prevent the Court from granting summary adjudication of the first cause of action. That the amount of damages was not adjudicated in SMUD's motion is also not relevant. SMUD sought only a declaration that it was entitled to damages."

The trial court additionally noted that "Fru-Con, however, offers no evidence that it informed SMUD that it was willing to [remove and replace the concrete] before it was terminated. Indeed, it is undisputed that on December 22, 2004, approximately one month before it was terminated, Fru-Con again informed SMUD that it would not remove section C's concrete."

The matter proceeded to trial on the amount of SMUD's entitlement to excess costs, liquidated damages, and statutory penalties under the False Claims Act.

2. Summary Adjudication of the Declaratory Relief Claim

Although most motions for summary adjudication are brought by defendants, the Code of Civil Procedure also authorizes plaintiffs to move for summary adjudication. To this end, section 437c, subdivision (f)(1), provides that "[a] party may move for summary adjudication as to one or more causes of action within an action, . . . one or more claims for damages, or one or more issues of duty, if that party contends . . . that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both . . . . *A motion for summary adjudication shall be granted only*

if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Italics added.)

A trial court may grant summary adjudication of a declaratory relief claim when a ruling on the motion disposes of the entire cause of action. (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 846.) "The interpretation of a contract is clearly a proper subject of declaratory relief. . . . The fact the same issue of contract interpretation is also raised in other causes of action does not in itself bar declaratory relief or summary adjudication of that cause of action." (*Id.* at pp. 846-847.) "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court." (*Hollenbeck Lodge v. Wilshire Boulevard Temple* (1959) 175 Cal.App.2d 469, 476 (*Hollenbeck*), quoting *Maguire v. Hibernia Sav. & Loan Soc.* (1944) 23 Cal.2d 719.)

In addition, the trial court, "on a motion for summary adjudication, . . . may rule whether a defendant owes or does not owe a duty to plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that the ruling must completely dispose of the issue of duty." (*Linden Partners v. Wilshire Linden Associates* (1998) 62

Cal.App.4th 508, 522.) In *Linden Partners*, the Court of Appeal held that "it may fairly be concluded from settled authority and upon a reasonable interpretation of legislative intent that if, under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or nonexistence of a duty in the nature of a contractual obligation, it may properly do so by a ruling on that issue presented by a motion for summary adjudication." (*Id.* at p. 519.)

Although summary adjudication on declaratory relief claims may be granted in the pronouncement of contractual duties, a claim for declaratory relief may not be employed to circumvent the rule against partial adjudication of a cause of action for breach of contract. (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319 (*Hood*).) In *Hood*, an insurer sued its former agent for breach of a noncompetition agreement, asserting various causes of action premised on violation of the agreement. (*Id.* at p. 322.) The agent filed a cross-complaint alleging breach of contract and several tort causes of action. (*Ibid.*) The insurer responded by moving for summary adjudication of the agent's breach of contract cross-claim. The trial court denied the motion on the ground that it did not dispose of any action in the cross-complaint. (*Ibid.*) The insurer amended its complaint to state a cause of action for declaratory relief to the effect that the agent had breached the noncompetition agreement. The insurer then moved for summary adjudication on

the new declaratory relief claim. (*Ibid.*) The trial court granted the motion and the agent sought appellate writ relief. (*Id.* at p. 321-322.)

The issue presented in *Hood* concerned whether a party may "select issues (other than duty and punitive damages) implicated in one or more causes of action in its complaint or cross-complaint, amend that pleading to add a cause of action for declaratory relief as to those issues, and then obtain a summary adjudication of the declaratory relief cause of action . . . ." (*Hood, supra,* 33 Cal.App.4th at p. 321.) The *Hood* court held that a party cannot extract an element from another cause of action to resolve by summary adjudication because such a "result would fully subvert the restrictions of . . . section 437c, subdivision (f)(1)." (*Id.* at p. 321.) Moreover, under the circumstances, the *Hood* court deemed the new declaratory relief action to have been "unnecessary and superfluous . . . ." (*Id.* at p. 324.) Although the *Hood* court held that elements of a cause of action for breach of contract may not be severed and resolved by summary adjudication of a declaratory relief claim, the court expressly noted that the issue of contractual *duty* may nonetheless be resolved by summary adjudication. (*Id.* at p. 321.)

In sum, summary adjudication motions filed *by plaintiffs* to seek declaratory relief in contract actions may be granted only when disposing of an entire cause of action, when resolving an

actual controversy regarding the meaning of the terms of the agreement, or when determining the scope of a party's contractual duty.

3. Summary Adjudication of SMUD's Declaratory Relief Claim

Consistent with the trial court's prerogative to grant summary adjudication, SMUD sought declaratory relief in interpreting General Condition 36 and in determining Fru-Con's duty to replace deficient section C concrete under the terms of the construction contract. Under section 437c, subdivision (f)(1), the trial court had power to grant declaratory relief both on the issue of contract interpretation and on duty. (*Linden Partners, supra,* 62 Cal.App.4th at p. 522; *Hollenbeck, supra*, 175 Cal.App.2d at p. 476.) However, SMUD asked for more in its summary adjudication motion when it asked the trial court to determine that Fru-Con's refusal to replace the section C contract in fact constituted a breach of the construction concrete. The trial court granted SMUD's request and found SMUD properly terminated Fru-Con based on Fru-Con's express refusal to comply with the contract. The measure of damages was not resolved by summary adjudication but by trial of the issue to the jury.

The trial court erred in granting summary adjudication as to the element of breach by Fru-Con. "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or

excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Because the amount of damages could not be resolved as a matter of law, it was error for the trial court to determine by summary adjudication that Fru-Con breached the construction contract. (§ 437c, subd. (f)(1); *Linden Partners, supra,* 62 Cal.App.4th at p. 522; *Hood, supra,* 33 Cal.App.4th at p. 321.) Even though the trial court correctly observed that Fru-Con's refusal to remove and replace the section C concrete was undisputed, the inability to ascertain damages as a matter of law precluded summary adjudication of Fru-Con's breach.

4. Harmless Error Analysis

Our conclusion that the trial court erred in granting summary adjudication beyond the scope of section 437c, subdivision (f)(1), does not lead to automatic reversal of the judgment. Instead, we may reverse only if the error resulted in prejudice to Fru-Con. (Cal. Const., art. VI, § 13.) Under the circumstances of this case, we conclude that the trial court's error does not warrant reversal.

Under section 437c, subdivision (f)(1), the trial court had the prerogative to determine that Fru-Con owed SMUD a *duty* to replace deficient section C concrete. (*Linden Partners, supra,* 62 Cal.App.4th 522 [issue of contractual duty amenable to resolution by summary adjudication].) "[T]he concept of duty in

contract law may refer both to an overall contractual obligation or to a requirement of performance under an agreement. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) *Contracts*, § 775, p. 701 [if impossibility of performance exists at the time an agreement is made, 'no duty, i.e., no binding contract, arises. [Citations.]' (Italics omitted.)].) The concept of duty thus enters into the first three of the standard elements of a cause of action for breach of contract: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom. (4 Witkin, Cal. Procedure, *op. cit. supra*, *Pleading*, § 464, p. 504.)" (*Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 434-435, disapproved on other grounds in *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 563-564.)

Here, the summary adjudication order properly determined the existence of the construction contract, the meaning of General Condition 36, and that a refusal to replace a part of the power plant that failed to meet technical specifications would constitute a breach of Fru-Con's duty. Fru-Con received a trial on the issue of damages. The only issue erroneously determined in the summary adjudication order was the *fact* of Fru-Con's refusal to comply with the contract's specifications for the section C concrete.

It would be futile to reverse and remand for retrial simply to supply the undisputed fact of Fru-Con's breach of its duty to comply with General Condition 36. "Breach of duty is usually a fact issue for the jury, but it may be resolved as a matter of law if the circumstances do not permit a reasonable doubt as to whether the defendant's conduct violates the degree of care exacted of him." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 150.) Here, Fru-Con unequivocally and repeatedly refused to comply with General Condition 36. The evidence adduced in support and opposition to the summary adjudication motion supports the trial court's ruling that "it is undisputed that on December 22, 2004, approximately one month before it was terminated, Fru-Con again informed SMUD that it would not remove section C's concrete." Additionally, SMUD elicited an admission from Fru-Con's then-chief executive officer that it never wavered on the refusal to replace the section C concrete. The steadfast and undisputed refusal by Fru-Con means that this is a case in which breach of duty was capable of being resolved as a matter of law on an undisputed fact. No retrial is warranted to resolve an undisputed fact that establishes Fru-Con's breach of duty under the construction contract. (*Lysick v. Walcom*, *supra*, 258 Cal.App.2d at p. 150.)

Had SMUD not sought declaratory relief, but instead awaited the advent of trial to request an instruction that Fru-Con's undisputed refusal to replace the section C concrete constituted

a breach of contract, "the result would have been the same, and no good would result from sending the case back for a new trial, as it is apparent that the result would necessarily be the same, under the evidence of the defendant himself." (*Lompoc Produce Etc. Co. v. Browne* (1919) 41 Cal.App. 607, 613.) The error in granting summary adjudication beyond the scope of subdivision (f)(1) of section 437c is harmless.

G.

Delineation of Issues for the Jury to Decide

At the outset of trial, the court instructed the jury: "On February the 11th, 2005, SMUD terminated Fru-Con's right to proceed with work on the [Cosumnes Power Plant] project, and SMUD completed construction of the plant using other construction companies. [¶] This Court has determined that SMUD properly terminated Fru-Con's performance for cause under a provision of the contract referred to as General Condition 36 . . . . [¶] As a result, SMUD is entitled to seek damages permitted by [General Condition] 36. SMUD must prove the amount of these damages. Fru-Con claims it is entitled to damages based on its claim that SMUD breached the contract and that SMUD failed to mitigate or minimize certain damages claimed by SMUD under [General Condition] 36." At the end of trial, the court similarly instructed: "This Court has determined that SMUD properly terminated Fru-Con's performance for cause under a

provision of the contract referred to as General Condition 36 . . . ."

Fru-Con contends the trial court's instruction violated the prohibition of section 437c, subdivision (n)(3),[8] on commenting on the grant of a motion for summary adjudication to a jury. Although we have concluded that the trial court erred (albeit harmlessly) in its summary adjudication order, we nonetheless determine that the trial court did not err in instructing the jury about the issue it was called to decide.

Fru-Con established error in the summary adjudication order -- not for lack of breach by Fru-Con -- but due to the statutory

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[8] Subdivision (n) of section 437c provides:

"(1) If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion which has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

"(2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was either not sought or denied.

"(3) In the trial of an action, neither a party, nor a witness, nor the court shall comment upon the grant or denial of a motion for summary adjudication to a jury."

constraint on plaintiffs' motions for summary adjudication when damages cannot be set as a matter of law. As we have noted, the trial court correctly concluded that Fru-Con's undisputed refusal to comply with the directive to replace the section C concrete established its breach of contract.

Fru-Con offers no explanation as to how any determination of the scope of contractual duty or other matter properly determined as a matter of law can be revealed to the jury. Fru-Con would have us render a trial court unable to inform the jury about issues resolved as a matter of law.

As previously noted, "Breach of duty is usually a fact issue for the jury but it may be resolved as a matter of law if the circumstances do not permit a reasonable doubt as to whether the defendant's conduct violates the degree of care exacted of him." (*Lysick v. Walcom*, *supra*, 258 Cal.App.2d at p. 150; see also Evid. Code, § 310.) When an issue has been resolved as a matter of law prior to trial, the Code of Civil Procedure allows the court to inform the jury of such legal determinations. Code of Civil Procedure section 608 provides, in pertinent part, that "[i]n charging the jury the Court may state to them all matters of law which it thinks necessary for their information in giving their verdict . . . ." Here, the determination of breach of duty by Fru-Con was properly determined as a matter of law, and the trial court did not err in instructing the jury on the point.

Fru-Con argues that subdivision (n)(3) of section 437c precluded the court from instructing the jury regarding the breach by relying on *Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120 (*Raghavan*). *Raghavan,* however, offers Fru-Con no support because the decision explains that "[u]nder the summary judgment statute (§ 437c), a trial court may not instruct the jury as to any '*factual issue*' because, in ruling on a motion, the trial court does not adjudicate such 'issues.'" (*Id.* at p. 1134, italics added.) In the event of a meritorious motion by a defendant, "the trial court may decide that a cause of action should be summarily adjudicated because there are no disputed facts and it lacks merit as a matter of law. At the trial on a remaining cause of action, the statute precludes the trial court from commenting upon the grant of summary adjudication, for example, by instructing the jury that certain 'facts' are established." (*Ibid.*)

Raghavan, supra, 133 Cal.App.4th 1120 stands for the unremarkable proposition that contested issues of *fact* are not resolvable by summary adjudication and should not be commented upon by the trial court under a statute intended to resolve only issues of *law*. *Raghavan* does not undermine the trial court's authority under Code of Civil Procedure section 608 to instruct the jury on issues properly resolved as a matter of law. Indeed, subdivision (n)(1) of section 437c provides that "[i]f a motion for summary adjudication is granted, . . . *the action*

shall proceed as to the cause or causes of action, affirmative defense or defenses, *claim for damages, or issue or issues of duty remaining*." (Italics added.) The trial court thus may frame the factual issues remaining for determination by the jury. In this case, the court did not err in fulfilling its obligation to frame the issues of fact that remained for resolution by the jury.

II

Exclusion of Evidence that SMUD Failed to Mitigate its Damages by Disallowing Fru-Con to Remain on the Job

Fru-Con argues that it was erroneously deprived of the opportunity to introduce evidence that SMUD would have reduced its damages by allowing Fru-Con to remain on the job. Fru-Con essentially contends SMUD had no right to terminate Fru-Con's right to proceed if keeping Fru-Con on the job would have been cheaper than hiring replacement contractors. We reject the argument.

California law requires that "[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41.) In a trial on the issue of damages arising out of the breach, the party responsible for the breach may nonetheless attempt to reduce its liability for damages by introducing

evidence that the other party could have taken reasonable steps to reduce its losses. (See *ibid.*)

In arguing that the trial court erred in excluding evidence that "SMUD's termination of the entire contract constituted a failure to mitigate its damages," Fru-Con relies on the case of *Henrici v. South Feather Land Etc. Co.* (1918) 177 Cal. 442 (*Henrici*). In *Henrici*, a farmer's stubborn resistance to paying disputed water rates caused him to lose his fruit trees and vines when they withered. (*Id.* at p. 444-445.) Although our Supreme Court held that the farmer was entitled to the water rates he insisted upon, the farmer's claim for damages had to be reduced for failure to mitigate the losses. "If the [farmer] had continued to use a quantity of water approximating that received by him in prior years, paying the defendant what it asked, the cost to him would have amounted, in each year, to only a few dollars more than the sum payable under the contract. By paying the excessive price without conceding its correctness, he could have saved his trees, vines, and crops, and reduced his damage to a comparatively trifling sum. This it was plainly his duty to do." (*Id.* at p. 449.)

The defendant in *Henrici, supra,* 177 Cal. 442 "did not at any time refuse absolutely to furnish water. It was always ready to supply [the farmer's] land upon payment of the rates demanded by it. This was perfectly understood by the plaintiff, who was well aware that he could get the water by complying with

the defendant's demands." (*Id.* at p. 449.) While the water in *Henrici* would have served its purpose in maintaining the farmer's crops, Fru-Con's refusal to replace the concrete precluded the completion of the power plant in a manner that complied with the needs of a combined-cycle power plant cooling tower. As the evidence established, the engineer of record determined that the section C concrete needed to comply with the technical specifications due to the demands placed on it by the cooling tower's operation.

Under the construction contract, SMUD was not required to keep Fru-Con on the job when Fru-Con refused to correct deficient work. Consequently, the trial court did not err in excluding evidence based on a theory that SMUD could have reduced its costs by not terminating Fru-Con.

III

Whether Fru-Con was Held Responsible for Design Deficiencies and Design Changes in Violation of Section 1104

Fru-Con argues that "the $35.5 million excess damage award improperly held Fru-Con responsible for design changes and deficiencies" in violation of section 1104, which generally prohibits public entities from making construction contractors responsible for the design of a public works project. Fru-Con reasons that the numerous design changes and revisions occurring after the work began changed the scope of work so substantially that the jury's award of excess cost damages improperly held Fru-Con responsible for the cost of the design changes. In

particular, Fru-Con focuses on SMUD's introduction of evidence at trial showing that almost all of the design changes made by Utility Engineering during the construction could have been anticipated by an engineer at the outset of the project. Fru-Con argues that being held to such engineering expertise impermissibly shifted responsibility for the accuracy and completeness of the design to Fru-Con.

As we explain, the argument lacks merit.

A.

Construction Contract Provisions Applicable in the Event of Design Defects

The construction contract required Fru-Con to construct the Cosumnes Power Plant for a fixed sum. Special Condition 5 of the construction contract described the general scope of Fru-Con's duties as follows:

"The proposer shall provide complete turnkey construction including the supply of certain permanent construction materials, procurement services, construction logistics, materials receiving -- including materials procured by others, warehousing and storage which may include engineering design, equipment procurement and installation, project management, supervision, labor, testing, and all other incidentals necessary to accomplish the work in accordance with the Contract. In general, the scope of work includes engineering beyond the scope of drawings supplied by Utility Engineering, procurement and

construction of the above ground, Balance of Project phase of the Cosumnes Power Plant Project. The work is further described in the Special Conditions and in the Technical Conditions and attached project specifications, drawings, and geotechnical reports. The Civil and Underground contractor will provide the scope of work as described [in request for proposal] 2625.GVM and all addendum [*sic*]. The above ground, Balance of Project scope of work includes all necessary work necessary [*sic*] to complete and make ready for start-up the 500 MW combined cycle power plant described in these contract documents."

Special Condition 5 further stated that "Utility Engineering has provided the Specifications, Drawings and Documentation necessary for construction. Contractor shall use these documents for construction. Additional field engineering will be required by Contractor for all field run piping 2 1/2 inches and smaller, all cathodic protection, heat tracing, insulation, rigging, etc. . . . Contractor's responsibility includes design for only the following areas: heat tracing, building electrical & lighting, lighting protection, cathodic protection, fire protection, construction access road, small bore piping (limited to field sketches to be used for installation), field run electrical work, HVAC, building plumbing, or as otherwise referenced in this contract."

The construction contract relieved Fru-Con of the cost attributable to work not originally contemplated in the

construction contract. Entitled, "Contract Price Adjustment for Scope Changes," Special Condition 51 provided, in pertinent part: "It is understood that the project design is not complete and is therefore subject to further change by the Parties. Contractor shall be entitled to adjustment of the Contract Price pursuant to [Special Condition] 14.1 for any such change, provided that the Contractor establishes that the additional work required by the change could not be reasonably inferred as required or necessary to complete the construction based on the total scope of construction services as described in these Contract Documents, is not required by any law, ordinance, regulation, code or standard applicable to the Project, and increases Contractor's time and/or cost to perform. If the design change involves a refinement, correction or further detailing of the design drawing(s), the Contractor shall not be entitled to a Contract Price adjustment unless such refinement, correction or further detailing is made after procurement or construction has commenced in reliance on the design drawings(s)."

B.

Section 1104

Section 1104 provides: "No local public entity, charter city, or charter county shall require a bidder *to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public*

works projects, except on clearly designated design build projects. Nothing in this section shall be construed to prohibit a local public entity, charter city, or charter county from requiring a bidder to review architectural or engineering plans and specifications prior to submission of a bid, and report any errors and omissions noted by the contractor to the architect or owner. The review by the contractor shall be confined to the contractor's capacity as a contractor, and not as a licensed design professional." (Italics added.)

The bill that enacted section 1104 was introduced in 1999 "to benefit contractors to local public works projects." (Assem. Com. on Local Government, 3d reading analysis of Assem. Bill No. 1314 (1999-2000 Reg. Sess.) as amended April 26, 1999, p. 1.) As the Assembly Committee's bill analysis noted, "Construction projects typically begin with an architect and/or engineer preparing plans. Once the plans are complete, the contractor is hired to build according to those plans. According to the sponsor, Construction Employers' Association, this long-standing division of responsibilities provides contractors with a measure of confidence when submitting proposals on competitively bid projects that the bid documents are complete and accurate." (*Ibid.*) The bill analysis further noted that the impetus for the bill was the sponsor's observation that "local public entities have on occasion inserted contract provisions, which shift design responsibility

to the general contractor. The sponsors argue that design risk should be borne by licensed architects and engineers."

C.

Whether the Excess Cost Damages Violated Section 1104

We note that Fru-Con does not contend the construction contract expressly declared Fru-Con to have final design responsibility for the power plant or to certify the correctness of the plant's design. Fru-Con also does not assert that section 1104 was violated by the construction contract's requirement that Fru-Con design and build portions of the power plant, including "heat tracing, building electrical & lighting, lighting protection, cathodic protection, fire protection, construction access road, small bore piping . . . , field run electrical work, [and] HVAC, building plumbing . . . ." Instead, Fru-Con's argument focuses solely on the contention that the excess cost damages effectively held Fru-Con responsible for the entire design of the power plant.

Fru-Con's contention that it had final design responsibility for the Cosumnes Power Plant lies at odds with its theory of the case at trial. During trial, Fru-Con elicited testimony that the power plant's design was the responsibility of Utility Engineering. Fru-Con's theory of the case sought to blame Utility Engineering for cost overruns and delay based on that company's poor design work. Thus, Fru-Con's counsel elicited the answer from SMUD's damages expert that the power

plant "project was not a design [and] build job." The testimony elicited by Fru-Con to the effect that Utility Engineering bore final responsibility for the plant's design undermines Fru-Con's current argument that the construction contract violated section 1104 by requiring Fru-Con to assume ultimate design responsibility.

Moreover, the provisions of the construction contract undermine Fru-Con's argument that the damages award had the effect of improperly shifting design responsibility to the contractor. Special Condition 51 provided Fru-Con with express entitlement to additional compensation for work not encompassed within the initial design specifications. On this point, Fru-Con's elicited testimony showing that, prior to termination from work under the contract, Fru-Con submitted forward pricing requests for change orders reflecting what "Fru-Con believed it would cost to overcome the changes in [Utility Engineering]'s design." Fru-Con understood and availed itself of the express contractual remedy for performance of work not within the scope of the construction contract.

SMUD's damages expert factored in Fru-Con's right to payment for design problems and revisions caused by SMUD or Utility Engineering. Dieterle credited Fru-Con $333,740 for work not required under the contract. And, the jury's special verdict form credited Fru-Con with $1,496,449 for valid requests for change orders. In short, the construction contract not only

expressly recognized Fru-Con's entitlement to payment for work not within the original scope of the contract but provided a remedy for design deficiencies by SMUD's engineer of record.

Fru-Con brushes aside Special Condition 51 by complaining that Fru-Con was held to understand the scope of work in the construction contract with the knowledge and skill possessed by an engineer. Thus, Fru-Con contends section 1104 is violated by requiring a bidder (or proposer) on a project to have an engineering expertise in ascertaining the cost for the given scope of work. Fru-Con fails to explain how *any* complex project requiring engineering expertise for the design can pass muster under section 1104 if bidders cannot be expected to understand the work required for the project.

As the record in this case demonstrates, a project such as a combined-cycle power plant requires extensive engineering. To accept Fru-Con's argument would require complex construction projects to be built by the engineers themselves. Section 1104 does not require such an absurd result because it only relieves the contractor from responsibility *for designing* the project, even while it allows the contractor to be responsible *for understanding* the design provided by the engineer.

As the California Supreme Court has explained: "[A]lthough . . . section 1104 prohibits public entities from requiring bidders to assume responsibility for the completeness and accuracy of architectural or engineering plans and

specifications, public entities retain the power to contractually disclaim responsibility for assumptions a contractor might draw from the presence or absence of information. As . . . explained in *Wunderlich* [*v. State of California* (1967) 65 Cal.2d 777]: 'It is obvious that a governmental agency should not be put in the position of encouraging careless bidding by contractors who might anticipate that should conditions differ from optimistic expectations reflected in the bidding, the government will bear the costs of the bidder's error. . . . When there is no misrepresentation of factual matters within the state's knowledge or withholding of material information, and when both parties have equal access to information as to the nature of the tests which resulted in the state's findings, the contractor may not claim in the face of a pertinent disclaimer that the presentation of the information, or a reasonable summary thereof, amounts to a warranty of the conditions that will actually be found.' (*Wunderlich v. State of California, supra*, 65 Cal.2d at pp. 786–787.)" (*Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 752.)

Nothing in section 1104 relieves a contractor who seeks to build a complex public works project from having a sufficient understanding of the costs and requirements of the specifications in order to formulate a valid bid or proposal. Here, the evidence showed that the engineering design for the

plant was more complete than on most power plant projects, and that most of the subsequent design changes could have been anticipated at the outset of the project. Consequently, the excess cost damages award did not violate section 1104.

IV

Failure to Give Fru-Con's Proposed Instructions Regarding Section 1104 and a Contractor's Duties under a Public Works Contract

Fru-Con asserts instructional error in the failure to give six special instructions proposed by Fru-Con regarding SMUD's responsibilities for problems with the design specifications for the power plant. Specifically, Fru-Con argues that the court erred by failing to instruct the jury (1) on section 1104, and (2) regarding the scope of work that Fru-Con could reasonably infer from the construction contract.

Although Fru-Con enumerates two more points regarding closing arguments by SMUD and the "closeness of the jury's verdict," these contentions pertain to an analysis of prejudice. Because we conclude that the trial court did not err, we do not address Fru-Con's points about prejudice arising from the asserted instructional errors.

A.

Duty to Instruct the Jury

The principles governing the trial court's duty to instruct the jury on the relevant law are well settled. "Litigants are entitled to jury instructions that fairly and clearly state the

essential legal principles applicable to the case. [Citations.] Jury instructions are sufficient if they supply the jury with a balanced statement of the necessary legal principles applicable to the theories of the case presented. [Citation.] The trial court is not required to give every instruction offered by a litigant. [Citation.] Irrelevant, confusing, incomplete or misleading instructions need not be given." (*Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 208-209.)

A party may propose nonargumentative instructions for the trial court to give to the jury. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) "'Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.]' [Citations.] Finally, '[e]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given.'" (*Major v. Western Home Insurance Company* (2009) 169 Cal.App.4th 1197, 1217.)

B.

Proposed Instructions Regarding Section 1104

Fru-Con challenges the trial court's refusal to give proposed special instructions Nos. 14, 17, and 26 on the applicability of section 1104.[9]

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[9] Proposed special instruction No. 14 stated: "I instruct you that as a matter of law, SMUD is responsible to FRU-CON for the accuracy and completeness of the Project plans, specifications and drawings prepared by [Utility Engineering] or its subcontractor, Shaw. As between SMUD and FRU-CON, SMUD is [Utility Engineering] and SMUD is Shaw. If you find that the plans, specifications and/or drawings prepared by [Utility Engineering] or Shaw and provided to FRU-CON by SMUD caused FRU-CON to perform extra work that was not reasonably inferable from the plans, specifications and/or drawings provided to FRU-CON at the time FRU-CON and SMUD signed the contract, then you must find in favor of FRU-CON and against SMUD on FRU-CON's claims for damages for that extra work."

Proposed special instruction No. 17 stated: "FRU-CON was required to build the Project according to the plans and specifications prepared by SMUD or its agents. Because FRU-CON is bound by those plans and specifications, FRU-CON is not responsible for the consequences of errors, mistakes, or inconsistencies in the plans and specifications, or the consequences of performing the Project in accordance with plans and specifications which are misleading or otherwise inadequate for construction. [¶] If you find that the plans or specifications provided by SMUD to FRU-CON contain errors, mistakes, inconsistencies or are misleading or otherwise inadequate for construction, you cannot find FRU-CON liable for the delays or costs arising from the errors, mistakes, or inconsistencies in the plans and specifications, or arising from performance of the Project in accordance with plans and specifications which are misleading or otherwise inadequate for construction."

Proposed special instruction No. 26 stated: "There is a provision in the Contract between FRU-CON and SMUD called

We have already rejected Fru-Con's contention that the construction contract violated section 1104 by holding Fru-Con responsible for overall design of the Cosumnes Power Plant. (See part III C., *ante*.) We also reject Fru-Con's contention that the jury should have been instructed on section 1104. A party has no right to have the jury instructed on principles of law not at issue in a case. (*Harris v. Oaks Shopping Center*, *supra*, 70 Cal.App.4th at pp. 208-209.) The requirement that contractors certify the accuracy and completeness of engineering specifications for a public works project was inapplicable in this case. Based on this conclusion, we also reject Fru-Con's argument to the effect that "under section 1104, design plans create an implied warranty."

We also find no error insofar as Fru-Con's argument pertains to the right not to be held liable for SMUD's (and its

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Special Condition 51 or SC-51. [¶] The parties disagree about the meaning and application of SC-51 to the claims and defenses asserted by the parties in this case. It is up to you, the jury to decide the meaning and application of SC-51 to the claims and defenses asserted by the parties based on the evidence you have heard and instructions and law that I provide. [¶] In deciding the meaning and application of SC-51, I instruct you that, as a matter of law, a contractor's review of contract drawings and specifications is confined to a contractor's capacity as a contractor, and not as an engineer or other design professional. I further instruct you that California law does not permit a public body to shift design responsibility to a contractor. [¶] If you find that SMUD determined its damages for Excess Costs, as defined herein, based solely on an engineering analysis, then you must find that it has not proved its damages for Excess Costs." (Italics added.)

engineer of record's) errors and mistakes. As we have observed, the trial court instructed the jury that excess cost damages were limited to "work that Fru-Con promised to perform under the construction contract . . . ." The court further noted that damages were limited to "costs SMUD paid to other contractors to finish *Fru-Con's scope of work* under the construction contract."

Conversely, the trial court instructed: "Fru-Con claims SMUD breached the contract by delivery of mis-fabricated materials, by late delivery of materials and equipment, and *by providing a defective and late design that caused Fru-Con to perform extra work and its performance costs and time to increase.*" (Italics added.) This instruction reiterated that Fru-Con's liability was limited to the work it had agreed to perform. Taken together, the trial court's instructions correctly apprised the jury that Fru-Con was not responsible for design defects and mistakes caused by SMUD or Utility Engineering.

Fru-Con's proposed special instructions were not necessary to inform the jury that Fru-Con sought to reduce its liability to the extent that delays were caused by poor design of the power plant.

C.

Proposed Instructions Regarding Scope of Work

Fru-Con contends the trial court failed to properly instruct the jury regarding Fru-Con's scope of work under the

construction contract. Fru-Con argues that the court was required to give its proposed special instructions Nos. 16, 18, and 25 to apprise the jury of Fru-Con's limited duties under the construction contract.[10] We disagree.

The trial court instructed the jury that SMUD could recover only those costs incurred for performance of work required to be completed by Fru-Con under the construction contract as follows: "In order to recover damages under [General Condition] 36 of the construction contract, SMUD must prove either or both of the

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[10] Proposed special instruction No. 16 provided, in pertinent part: "If an owner furnishes plans and specifications for a contractor to follow in a construction job, the owner impliedly warrants the sufficiency and correctness of the plans and specifications for their intended purpose, and that such plans and specifications will be adequate for the construction of the project, free of errors, mistakes or inconsistencies, and not misleading. [¶] If the plans and specifications contain errors, mistakes, inconsistencies or are misleading or otherwise inadequate for construction, the owner has breached the implied warranty [of correctness]."

Proposed special instruction No. 18 provided: "If a contractor, acting reasonably, relies on plans and specifications issued by another contracting party as the basis for bid, and those plans and/or specifications contain errors, mistakes, inconsistencies or are misleading or otherwise inadequate for construction, and as a result, the contractor submits a bid which is lower than he would otherwise have made, the contractor may recover in a contract action for extra work."

Proposed special instruction No. 25 provided: "'In Scope Work' as used in this case is defined as the work FRU-CON was required to perform based on documents contained in the Request for Proposal, the Contract executed on August 20, 2003, and Change Order Nos. 1-3. All other work is considered 'Out of Scope Work.'"

following: [¶] (1) The excess costs incurred by SMUD to complete *the work Fru-Con was to perform under the construction contract;* and [¶] (2) Liquidated damages." (Italics added.)

The trial court further delineated SMUD's entitlement to excess damages by instructing: "Excess costs are the difference between the agreed price in the construction contract (as amended by the three signed change orders to the construction contract) in the amount of $108,136,825, and the total amount of money spent by SMUD to complete the work that Fru-Con promised to perform under the construction contract. The work that Fru-Con promised to perform under the construction contract will be referred to as 'Fru-Con's scope of work.' The total cost to SMUD to complete Fru-Con's scope of work under the construction contract includes: [¶] 1. The costs SMUD paid to Fru-Con for its work on the [Cosumnes Power Plant] Project; [¶] 2. The costs SMUD paid to other contractors to finish Fru-Con's scope of work under the construction contract."

These instructions clearly indicated that the jury could award excess costs to SMUD only for work required of Fru-Con in the construction contract. Moreover, the instructions placed the burden of proof on SMUD to show the extent of the excess costs and that they fell within Fru-Con's scope of work. The jury understood that Fru-Con was not responsible for work not specified in the contract because the jury awarded $1,496,449 on Fru-Con's claims arising from its requests for change orders.

Proposed instructions Nos. 16 and 18 repeat Fru-Con's legal theory under section 1104 that Fru-Con was entitled to rely on the correctness of the plans and specifications. As discussed in IV B. above, there was no need for these instructions. Proposed instruction No. 25 was Fru-Con's attempt to define "in-scope" and "out-of-scope." In light of the jury instructions given on scope of work, this proposed instruction was redundant and unnecessary. Accordingly, the trial court did not err in rejecting these proposed special instructions.

V

Sufficiency of the Evidence Regarding Excess Cost Damages

Fru-Con contends insufficient evidence supported the jury's award of excess cost damages to SMUD. Specifically, Fru-Con argues that the testimony of SMUD's certified cost engineer, Dieterle, did not constitute substantial evidence. We conclude that the evidence presented during the three-month trial supported the jury's award of $35,558,258 in excess cost damages to SMUD.

A.

Substantial Evidence Test

We begin with the familiar standard of review applicable to claims of insufficient evidence. "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often over-looked principle of law, that . . . the power of an appellate court begins and ends with a determination as to

whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.) We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court. (*Ibid.*; *Bandle v. Commercial Bank of Los Angeles* (1918) 178 Cal. 546, 547.)" (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

B.

Necessity of Source Documents

Fru-Con contends SMUD was required to introduce the source documents on which Dieterle's testimony was premised. We reject the argument that the failure to introduce an "additional document" providing "a much more defined definition as to what was intended to be included under those cost codes" precluded Dieterle's testimony from constituting sufficient evidence of SMUD's excess cost damages.

Dieterle testified that he worked with an expert on building power plants, and that together they reviewed many source documents to ensure that they were correctly sorting costs according to whether the work was within the scope of Fru-Con's duties under the construction contract. Dieterle explained, "For the change order request[s] I worked very

carefully with Bob Zanetti using [Special Condition] 51 or [General Condition] 6 to carefully go through each change order request to determine which of those would represent a legitimate change in scope to Fru-Con."

A party is not constrained to rely on any particular type of evidence in proving entitlement to and the amount of compensatory damages arising from a breach of contract. Evidence includes "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140.) Expert testimony suffices to establish the amount of a compensatory damages award. (E.g., *Abbott v. Taz Exp.* (1998) 67 Cal.App.4th 853, 857.) Nonetheless, "expert testimony does not constitute substantial evidence when based on conclusions or assumptions not supported by evidence in the record (*Hongsathavij v. Queen of Angels Etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1137), or upon matters not reasonably relied upon by other experts (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113). Further, an expert's opinion testimony does not achieve the dignity of substantial evidence where the expert bases his or her conclusion on speculative, remote or conjectural factors. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487.)" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Expert testimony may be necessary when the sheer volume of documentary evidence precludes efficient and effective review by the trier of fact. Recognizing this practical necessity, the Evidence Code provides that "[o]ral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." (Evid. Code, § 1523, subd. (d).) Thus, an expert may provide summaries of documents showing a party's financial losses. (*Heaps v. Heaps* (2004) 124 Cal.App.4th 286 (*Heaps*).)

In *Heaps*, a party who was required to turn over the proceeds from a trust appealed the judgment by contending that no substantial evidence established the value of the trust. (*Heaps, supra,* 124 Cal.App.4th at pp. 293-294.) The value of the trust had been submitted at trial by a schedule of assets, and some of the evidence underlying the schedule was not admitted in evidence. (*Id.* at p. 293.) The *Heaps* court concluded that sufficient evidence nonetheless supported the valuation of the trust, noting that "since the schedule [of assets] was a general compilation of documents that could not be examined individually by the court without great loss of time, it was admissible. (See Evid. Code, § 1523, subd. (d) ['[o]ral testimony of the content of a writing is not made inadmissible . . . if the writing consists of numerous accounts or other

writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole'].)" (*Id.* at pp. 293-294.)

The holding in *Heaps, supra,* 124 Cal.App.4th 286 comports with the well-settled rule that "secondary evidence of the contents of a writing may be received where the writing consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole. In such case the results of an examination made by a qualified person of such books *and documents may be proved by his testimony*." (*Sachs v. Killeen* (1958) 165 Cal.App.2d 205, 214, italics added.)

Expert testimony summarizing the cumulative import of source documents can constitute substantial evidence even if the examined documents themselves are not admitted into evidence. For example, in *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767-768 (*Greenwich*), damages arising from breach of a partnership agreement were established by testimony of one of the partners along with that partner's "handwritten itemization" of out-of-pocket expenditures. (*Greenwich, supra,* 190 Cal.App.4th at pp. 748-749.) On appeal, the defendant challenged the sufficiency of the evidence by claiming the handwritten summaries did not constitute substantial evidence of the claimed losses. The defendant pointed out that the partner's testimony "was not otherwise supported by cancelled

checks or the like." (*Id.* at p. 767.) The *Greenwich* court affirmed the judgment, explaining that "[t]he testimony of one witness may provide substantial evidence. [Citation.] Cancelled checks or official documentation of the costs incurred are not required to support the jury's award. The absence of such documentation goes to the weight of the evidence and the credibility of the witness. Those determinations are for the jury." (*Id.* at pp. 767-768.)

Dieterle was not required to testify about or introduce each of the individual invoices, as Fru-Con suggests. Accepting Fru-Con's argument would require testimony and documentary evidence for every project cost code and every invoice upon which the cost damages were ultimately based. Evidence Code section 1523, subdivision (d), alleviated the need to make this already lengthy trial an even more protracted one.

C.

Dieterle's Reliance on the Brinig and Company Spreadsheet

Fru-Con argues that Dieterle "based his conclusions on alleged facts and assumptions without evidentiary support." Fru-Con bases its argument on the assertion that "Dieterle's calculation of SMUD's excess cost damages relied on an unseen, unauthenticated spreadsheet disavowed by its purported source." Fru-Con's portrayal of Dieterle's testimony as unquestioningly reliant on a "mystery spreadsheet" distorts the record, and we reject it.

Dieterle's testimony provided a basis for the jury's award of $35,558,278 in damages for excess costs to SMUD. Dieterle's calculations required 800 hours of work in addition to 500 hours of additional assistance from another cost engineer.

One of the main tasks performed by Dieterle was sorting through the invoices of the replacement contractors to determine whether the work should have been completed by Fru-Con under the construction contract. To determine whether to include or exclude the work billed by the replacement contractors, Dieterle *began* by using a spreadsheet of costs that he received from Brinig and Company. The first spreadsheet provided to Dieterle did not offer him sufficient information. As Dieterle testified: "I was initially provided a list of, I would say, a hundred and fifty to two hundred individual vendors and contractors that identify -- I believe that it's the same amount, if I'm not mistaken. It was in the three hundred and fifty million dollar range of all the costs that were expended to complete the [Cosumnes Power Plant]. [¶] Unfortunately, that document only provided me with the total amount. I got back with the Brinig representatives, and it may not have been Brian [Brinig] himself. I said, I'm sorry, I need a little bit more information than the total, give me a breakdown that identifies it by not only the vendor but by the cost code and the amount and also when it occurred or when it was posted as an accounting measure."

The second spreadsheet that Dieterle received from Brinig and Company listed costs by cost code, by amount and month of the expenditure, and by vendor. Dieterle did not simply total the costs listed in the spreadsheet to determine excess costs. Rather, the spreadsheet "was actually the starting point of [Dieterle's] evaluation." Dieterle reviewed the individual task orders submitted by the replacement contractors. Thus, Dieterle was able to determine on an invoice-by-invoice basis which costs were fairly attributable to Fru-Con's scope of work. Working with Zanetti, Dieterle explained: "[W]e utilized all the different project records we could utilize, primarily starting with the description of what the cost code was to identify whether it was in scope or out of scope." Dieterle made further refinements to his evaluation, noting that "we looked at . . . the engineering type information, the field directives, the field memos, change order requests, [and] engineering drawings . . . ." Thus, Dieterle concluded that Fru-Con was entitled to a $481,865 credit for work performed by the replacement contractors but not within the scope of the original construction contract. In reaching this conclusion, Dieterle corrected cost-code errors in the Brinig and Company spreadsheet.

The reliability of the invoices relied upon by Dieterle and Zanetti in assessing the replacement contractors' costs was established by SMUD's verification of the charges in the

invoices. Moffitt testified that he reviewed the invoices as they were submitted in order to ensure that billing was accurate as to the labor and materials for which SMUD was billed. Moffitt rejected invoices for materials when he found them to be unreasonable or for unauthorized labor or materials. The evidence showed that SMUD kept careful track of costs and invoices. In addition to submitting invoices twice a month, the replacement contractors submitted lengthy monthly project reports listing total hours and materials required to complete the project.

The evidence sufficed to establish the amount of excess damages due to SMUD for Fru-Con's breach of contract. The testimony also established that the source documents relied upon to calculate damages were voluminous. In such a circumstance, Dieterle's testimony was a permissible manner in which to introduce the evidence regarding the extent of SMUD's damages.

Fru-Con's complaint that Dieterle only testified regarding some of the cost codes employed by SMUD essentially contends that Dieterle's 250 pages of testimony regarding costs was not sufficiently in-depth to show the extent of SMUD's damages. Not so. As we have explained, Evidence Code section 1523, subdivision (d), allows for an expert to summarize the cumulative totals from review of thousands of documents. The jury did not need to sort through thousands of documents to

confirm every cost factored into Dieterle's summaries. The evidence of SMUD's excess costs was sufficient and credible.

Our conclusion regarding the sufficiency of the evidence is not undermined by the fact that Brian Brinig testified that he had not personally prepared the spreadsheet used by Dieterle. Dieterle testified about the revised spreadsheet: "I'm certain I got it from Brinig and Company. [Brian Brinig] may not recognize it. I also worked with at least two or three other members of his staff. [¶] . . . [¶] So all I can say is I didn't prepare this document. The information at worst came from a spreadsheet that we printed. Why [Brian] Brinig didn't know it, I can surmise that it was provided by one of his staff, but I received it from [Brian] Brinig."

Uncertainty about the exact person at Brinig and Company who prepared the spreadsheet is inconsequential because Dieterle used it only as a starting point for his investigation of excess cost damages. Rather than accepting the sums listed on the spreadsheet, Dieterle and Zanetti spent many hours comparing the spreadsheet with the source documents, and, in doing so, corrected errors in the spreadsheet. Dieterle also reviewed the conclusions of Fru-Con's cost experts and increased the credit due to Fru-Con by $150,000.

The evidence is not insufficient simply because the spreadsheet itself was not introduced into evidence. Given Dieterle's extensive investigation of underlying documents and

resulting adjustments, Dieterle's conclusions did not need to be bolstered by the introduction of a spreadsheet that merely served as the starting point for the cost engineer's in-depth analysis.

D.

"Lump Sum" Contracts

Fru-Con next contends that the evidence regarding approximately $10 million in "lump sum" contracts paid by SMUD was inadequate to support that portion of the excess cost damages. We disagree.

Fru-Con's argument focuses on an exhibit prepared by Dieterle, which lists SMUD as paying: $3,949,852 to F. Rodgers Insulation; $1,729,483 to the Newtron Group; $1,479,900 to KW Construction; $559,168 to Bigge Power Constructors; and $2,215,566 to "other contractors/vendors." Dieterle testified about the exhibit as follows:

"Q. Well, you've listed actually four and then other contractor vendors, you've got F. Roger's Insulation, Newtron Group, K.W. Construction, Biggee [*sic*] Power Constructors and then other contractors and vendors. What are those amounts that you have opposite each of those contractors come from [*sic*]?

"A. [Dieterle]: Those amounts, again, came from my review of those individual contracts starting with the amount that was actually spent and paid by SMUD, and then evaluating what

portion of those amounts would be attributable to Fru-Con's scope of work.

"Q. . . . [¶] The last item was other contractors/vendors. Was that a collection of cost for various contractors and vendors?

"A. Yes. That's a summary of some of the smaller contractors and vendors that we evaluated.

"Q. Approximately how many other contractors and vendors are there in that category?

"A. In that particular category there are 15 other individual contractors and vendors totaling . . . that two point two one five million."

Fru-Con contends that "[t]he entries on an inadmissible demonstrative exhibit, and Dieterle's conclusory and unsupported testimony about that exhibit, could not possibly constitute evidence of a credible or reasonable nature to support $9.9 million in damages." We disagree.

The testimony of a single witness is sufficient to sustain a verdict. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Sachs v. Killeen, supra,* 165 Cal.App.2d at p. 214.) Contrary to Fru-Con's claim, Dieterle's testimony on this point cannot be limited to that quoted above. Instead, we also consider Dieterle's explanation of his methodology in assessing the correct allocation of costs by reviewing thousands of invoices and other source documents. Dieterle's formulation of a summary

for the jury's consideration comported with Evidence Code section 1523, subdivision (d), and alleviated the need to present documentary evidence of every invoice submitted by the replacement contractors on the project. (*Greenwich, supra*, 190 Cal.App.4th at pp. 767-768; *Heaps, supra*, 124 Cal.App.4th at pp. 293-294.)

This case is one in which "secondary evidence of the contents of a writing may be received where the writing consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole. In such case the results of an examination made by a qualified person of such books and documents may be proved by his testimony." (*Sachs v. Killeen*, *supra*, 165 Cal.App.2d at p. 214.) Dieterle's testimony constitutes substantial evidence in support of the $9.9 million component of the excess cost damages award attributable to the replacement contractor categories.

E.

Conflicts in the Evidence

Fru-Con next challenges the excess cost damages award by pointing out that Dieterle did not address a discrepancy in totals listed on separate demonstrative exhibits. We reject the challenge because this was a factual issue determined by the jury.

"'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" (*Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492, citing *People v. Huston* (1943) 21 Cal.2d 690, 693.) The fact that Fru-Con can calculate a $2 million difference between an exhibit showing what SMUD paid specifically to one of its contractors and another showing SMUD's overall damages constitutes a point that is arguable to a jury but is foreclosed by the substantial evidence rule. (*Evje, supra,* at p. 492.)

VI

Liquidated Damages Award

Fru-Con challenges the liquidated damages award to SMUD on several grounds. First, Fru-Con contends that the trial court's error in granting SMUD's motion for summary adjudication also requires reversal of the liquidated damages award. Second, Fru-Con asserts that the trial court's refusal to instruct on section 1104 compels reversal of the judgment. Third, Fru-Con argues that the liquidated damages award constitutes an illegal penalty.

Our conclusions that the summary adjudication was harmless error and that the construction contract did not violate section 1104 dispose of Fru-Con's first two arguments as grounds

for reversal of the liquidated damages award. (See parts I F. 4 and III C., *ante*.) As to Fru-Con's third argument on the issue of liquidated damages, we conclude that the liquidated damages award did not constitute an illegal penalty.

A.

Presumed Validity of Liquidated Damages Provisions

Liquidated damage provisions in contracts represent an agreement by the parties "to provide ahead of time that a certain sum of money is conclusively presumed to represent the amount of damage that will be caused by a specified breach of the contract." (*Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern California, Inc.* (2006) 135 Cal.App.4th 1023, 1028.) In nonconsumer cases, such provisions are presumed valid. (*Ibid.*) As pertinent to this case, subdivision (b) of Civil Code section 1671 provides that "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."

"The objective of a liquidated damages clause is to 'stipulate [to] a pre-estimate of damages in order that the [contracting] parties may know with reasonable certainty the extent of liability' in the event of breach. (*ABI, Inc. v. City of Los Angeles* (1984) 153 Cal.App.3d 669, 685.) Courts perform a '"reasonable endeavor"' test to determine the validity of the

liquidated damages provision measured at the time of contracting: 'The amount set as liquidated damages "must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained."' (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977.)" (*El Centro Mall, LLC v. Payless ShoeSource, Inc.* (2009) 174 Cal.App.4th 58, 63 (*El Centro Mall*), first brackets added.)

As the *El Centro Mall* court noted, "The Law Revision Commission comment to section 1671 explains: 'In the cases where subdivision (b) applies, the burden of proof on the issue of reasonableness is on the party seeking to invalidate the liquidated damages provision. The subdivision limits the circumstances that may be taken into account in the determination of reasonableness to those in existence "at the time the contract was made." The validity of the liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered has no bearing on the validity of the liquidated damages provision. . . . [¶] Unlike subdivision (d), subdivision (b) gives the parties considerable leeway in determining the damages for breach. All the circumstances existing at the time of the making of the contract are considered, including the relationship that the damages provided in the contract bear to

the range of harm that reasonably could be anticipated at the time of the making of the contract. Other relevant considerations in the determination of whether the amount of liquidated damages is so high or so low as to be unreasonable include, but are not limited to, such matters as the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract.' (Cal. Law Revision Com. com., 9 West's Ann. Civ. Code (1985 ed.) foll. § 1671, p. 498.)" (*El Centro Mall, supra*, 174 Cal.App.4th at p. 63.)

B.

Fru-Con's Burden of Proof

Fru-Con argues that the liquidated damages award constituted an illegal penalty because any liquidated damages accrued would have been cancelled had Fru-Con completed the power plant by May 3, 2005. In so arguing, Fru-Con relies on the portion of the construction contract that provides: "Intermediate Milestone liquidated damages shall be deducted from Contractor's monthly invoices and will accrue, along with interest at the blended SMUD investment rate, until Construction Substantial Completion. Should Construction Substantial

Completion be achieved within 573 calendar days following [full notice to proceed], accrued Intermediate Milestone liquidated damages will be paid to Contractor along with interest earned on these balances at the blended SMUD investment rate."

Fru-Con contends this cancellation clause proves that the damages specified for missing the intermediate construction milestones caused no harm to SMUD until after the May 3, 2005, deadline for the entirety of the project was missed. Fru-Con did not argue or introduce evidence in support of this argument in the trial court. For this reason, the issue has not been preserved for appeal.

As we have noted, the party seeking to challenge the validity of a liquidated damages provision in a nonconsumer case has the burden of proof. (*El Centro Mall, supra*, 174 Cal.App.4th at p. 63.) Here, Fru-Con did not meet its burden to show that the liquidated damages accrued prior to the May 3, 2005, deadline did not represent a reasonable estimation of the damages SMUD would incur for the delay.

Had Fru-Con sought to prove the invalidity of the liquidated damages provisions, SMUD would have had the opportunity to present rebuttal evidence showing that the liquidated damages provisions related to costs arising as soon as Fru-Con failed to meet an intermediate construction milestone. Conversely, SMUD might also have shown that the cancellation clause for the liquidated damages provisions

represented another manner in which to encourage Fru-Con to expend the necessary resources and effort to complete the project on time, regardless of whether prior delays had already burdened SMUD with additional costs.

In sum, Fru-Con cannot assert for the first time on appeal that the liquidated damages bore no relationship to SMUD's actual damages from the missed intermediate construction milestones.

VII

False Claims Act (Gov. Code, § 12650 et seq.)

Fru-Con attacks the $10,000 award under the False Claims Act on two grounds. First, Fru-Con contends insufficient evidence established that it knowingly filed any false claims. Second, Fru-Con argues that the court erred prejudicially in refusing to bifurcate trial on SMUD's claims under the False Claims Act. Neither contention has merit.

A.

Sufficiency of the Evidence

Under the False Claims Act, any person who "[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval" by a public agency "shall be liable to the state or to the political subdivision for three times the amount of damages that the state or political subdivision sustains because of the act of that person" in addition to "the costs of a civil action brought to recover any of those

penalties or damages, and shall be liable to the state or political subdivision for a civil penalty of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation . . . ." (Gov. Code, § 12651, subd. (a)(1).)

Although SMUD sought a total of $152,879 for a total of 12 instances of false claims, the jury awarded SMUD only $10,000. Fru-Con characterizes the $10,000 as a single award that necessarily excluded two weld certification invoices that Dieterle found to be false. Thus, Fru-Con focuses on the remaining 10 alleged instances of false claim submissions to argue that insufficient evidence supported the jury's award of the $10,000 statutory penalty. Specifically, Fru-con asserts that there was no evidence of "knowing falsity" in the submission of any invoice.

We begin our review by noting that the special verdict does not establish whether the jury found one or two instances of false claims by Fru-Con. The $10,000 award could have been premised on one instance at the statutory maximum penalty or two instances at the minimum $5,000 amount. (See Gov. Code, § 12651, subd. (a)(1).) However, for purposes of review, the possibility of a statutory maximum award means that sufficient evidence in support of any *one* of SMUD's claims under the False Claims Act requires us to affirm this portion of the judgment. Applying the substantial evidence test, we conclude that the

evidence did suffice to support the jury's award under the False Claims Act.

The contract established 135 milestones for the construction at which point Fru-Con was entitled to submit a payment application. Some milestones marked the completion of a task and others occurred at the start of construction on one of the plant's components. Each payment application required Fru-Con to certify that the work was either started or completed as specified for the particular milestone. Dieterle testified that such certifications are typical in the construction industry and "really are the contractor attesting to the accuracy of the information contained within the payment application. It's . . . a visual representation to the owner as to the accuracy of an individual payment application."

Fru-Con's project director testified in his deposition "that the work associated with these milestones would be easy to identify and that they were actually developed at the outset of the project to be non-confrontational." SMUD had a practice of inspecting Fru-Con's work upon receiving an invoice, and SMUD employees had no difficulty in ascertaining whether a payment milestone had been reached. SMUD found numerous instances of Fru-Con's demand for payment of milestones not yet achieved.

In preparation for trial, Dieterle reviewed all of Fru-Con's payment applications. Dieterle found "a repeated pattern" of payment applications by Fru-Con for milestones not achieved.

Fru-Con never revised a payment application on its own. Instead, SMUD would challenge the invoice and "Fru-Con would simply remove the milestones that were challenged and then resubmit the payment application as a revision."

Dieterle testified about Fru-Con's pattern of submitting invoices and resubmitting them after excluding the challenged milestones. Among his examples were: (1) a March 2004 invoice for 13 milestones amounting to $8.7 million, which was resubmitted with just 5 milestones for a claim of $4 million; and (2) a July 2004 invoice for 13 milestones amounting to $8.5 million was resubmitted for the same amount by switching two milestones, and was resubmitted a third time for only $8 million with another substitution of milestones. Based on his review of Fru-Con's billing and industry experience, Dieterle testified that "there is no reasonable explanation why Fru-Con would submit certified pay applications if it was honest in its billing and if it was following industry practices." Dieterle's testimony that Fru-Con's pay applications could not have been honest in light of its pattern of claims for unachieved milestones constitutes sufficient evidence to sustain the $10,000 award under the False Claims Act.

Fru-Con urges us to reverse for insufficient evidence because the federal district court in the related action dismissed SMUD's claim under the False Claims Act on a pretrial motion. However, Fru-Con makes no attempt to describe what the

evidence showed at the time that the federal court entered its pretrial order. The testimony and evidence adduced during trial in this case suffice to support the finding that Fru-Con filed at least one false claim within the meaning of Government Code section 12651, subdivision (a)(1). It is well settled that a district court's conclusion is not binding on us. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782.) However, in this instance, Fru-Con has failed even to show that the federal district court's decision in the related action is persuasive.

Fru-Con also contends that the "parties' practice of collaboration over Fru-Con's invoices negates knowing falsity" as required by the False Claims Act. Under Fru-Con's reasoning, SMUD's verification of invoices and its extensive interactions with Fru-Con employees precluded recovery for a false claim. We disagree. *SMUD's* diligence and extensive interactions with Fru-Con employees did not render *Fru-Con* unable to submit a false claim.

B.

Motion to Bifurcate

Fru-Con contends the trial court abused its discretion by denying a motion to bifurcate trial of the False Claims Act cause of action from SMUD's remaining causes of action. Fru-Con argues that its right to a fair trial was prejudiced by the inflammatory nature of the evidence introduced in support of the False Claims Act cause of action. We are not persuaded.

Code of Civil Procedure section 1048, subdivision (b), provides that a trial court, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues . . . ." The question of "[w]hether there shall be a severance and separate trials on issues in a single action is a matter within the discretion of the trial court, whose ruling will not be disturbed on appeal absent a manifest abuse of discretion." (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.) A court abuses its discretion by denying a motion to bifurcate when trial includes issues that are irrelevant and prejudicial to other claims. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1271 (*Omaha Indemnity*).)

In *Omaha Indemnity*, the Court of Appeal held that the trial court erred in refusing to sever a trial on the issues of whether tenants were responsible for an oil spill and whether the Omaha Indemnity Company had written a policy for which plaintiffs were beneficiaries. (*Omaha Indemnity, supra,* 209 Cal.App.3d at pp. 1269-1270.) As the *Omaha Indemnity* court noted, it made no sense to proceed to trial on the bad faith claim unless the tenant were first found liable for the oil spill. (*Id.* at p. 1271.)

Bifurcation of trial was also held to be required in *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824 (*Regents*). *Regents* involved an eminent domain action brought by a public university. (*Id.* at p. 826.) The *Regents* court affirmed the trial court's bifurcation on the issues of the condemnee's entitlement to compensation for lost business goodwill and the determination of the amount of any goodwill to which the condemnee might have been entitled. (*Id.* at p. 829.) As the *Regents* court explained, the question of entitlement is a matter preliminarily decided by the court, and the jury considers the scope of compensation only after the court finds actual entitlement. (*Id.* at p. 833.) Because it would have been confusing to conduct a simultaneous court trial on entitlement and jury trial on the value of the entitlement, the trial court properly severed the issues. (*Ibid.*)

In this case, the trial court did not abuse its discretion in denying Fru-Con's motion to sever the False Claims Act cause of action from trial of SMUD's claims for compensatory and liquidated damages. The evidence in support of the three types of damages overlapped extensively. All of the damages claims required evidence to explain the very lengthy construction contract, the basics of Fru-Con's duties in building a power plant, and the particulars of how intermediate construction milestones required both work by Fru-Con and payments from SMUD. Bifurcation of the False Claims Act cause of action would have

required unnecessary duplication of large portions of an already long trial.

We reject Fru-Con's assertion that the evidence presented on the False Claims Act cause of action "allowed SMUD to cast Fru-Con as a dishonest contractor and inflame the jury . . . ." The False Claims Act evidence was largely presented by testimony from Dieterle that Fru-Con engaged in a pattern of submitting invoices that could not be reconciled with honest billing practices in the construction industry. This testimony was no more inflammatory than other unflattering evidence introduced by SMUD regarding Fru-Con's conduct. For example, SMUD's introduction of meeting notes from Fru-Con officers and internal Fru-Con documents suggested a calculated decision to "[w]ork slowly without being TERMINATED" after Fru-Con estimated that SMUD was losing more money by having to buy power on the spot market than it was gaining from Fru-Con in liquidated damages. SMUD also introduced testimony that showed Fru-Con greatly increased its demands for more compensation almost immediately after the company realized that it was losing tens of millions of dollars on the project. On October 7, 2004, Fru-Con made a presentation in which it claimed that SMUD owed an extra $22 to $26 million due to construction problems for which SMUD was at fault. And, testimony by SMUD employees regarding Fru-Con's quality of work on the project painted an uncomplimentary

portrait of the contractor's technical abilities to perform the work required to build a power plant.

The False Claims Act evidence was no more inflammatory than the evidence introduced to prove compensatory and liquidated damages. And, the evidence relating to each category of damages claimed by SMUD overlapped to a substantial degree. Accordingly, the court did not err in denying Fru-Con's motion to bifurcate trial.

VIII

Prejudgment Interest

Finally, Fru-Con contends SMUD was not entitled to prejudgment interest because the excess cost damages could not be reasonably ascertained prior to commencement of trial. We disagree.

Civil Code section 3287, subdivision (a), provides for prejudgment interest by stating, in pertinent part, that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt." As our high court has elaborated, "'The policy underlying authorization of an award of prejudgment interest is to compensate the injured party -- to make that party whole for the accrual of wealth which

could have been produced during the period of loss.' (*Cassinos v. Union Oil Co*. (1993) 14 Cal.App.4th 1770, 1790.) '[I]n situations where the defendant could have timely paid [a certain] amount and has thus deprived the plaintiff of the economic benefit of those funds, the defendant should therefore compensate with appropriate interest.' (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 962.) 'It has long been settled that [Civil Code] section 3287 should be broadly interpreted to provide just compensation to the injured party for loss of use of money during the prejudgment period.' (*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 132.)" (*Great Western Drywall, Inc. v. Roel Const. Co., Inc.* (2008) 166 Cal.App.4th 761, 767-768.)

Fru-Con argues that SMUD's damages were uncertain prior to the jury's verdict because "Fru-Con disputed the calculation of SMUD's excess cost damages throughout the litigation" and it introduced evidence regarding work it considered "out of scope" under the construction contract and entitlement to extensions of dates used by SMUD in calculating liquidated damages. We reject the contention.

The mere fact of a dispute between the parties regarding the amount of damages does not preclude an award of prejudgment interest. "The existence of a bona fide dispute between the parties as to the amount owing under an express contract does not render that sum 'unliquidated.'" (*Rabinowitch v. Cal.*

Western Gas Co. (1967) 257 Cal.App.2d 150, 161.) Here, the excess cost damages were calculable by including all costs SMUD reasonably incurred to complete the scope of work to which Fru-Con agreed in the construction contract. The jury's excess cost damages award approximated what Dieterle concluded was the correct measure of compensatory damages. "[T]he erroneous omission of a few matters from the account or erroneous calculation of the costs do not mean that the damages are not capable of being made certain by calculation." (*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 409.) Fru-Con's presentation of a vigorous defense did not negate SMUD's entitlement to prejudgment interest.

We note that in January 2005, Fru-Con calculated that it would cost approximately $138 million to complete the power plant. Adding in Fru-Con's original expectation of a $10 million profit on the project yields a $148 million figure that comes close to SMUD's actual $155 million aggregate cost of the power plant. Fru-Con's own pretrial estimate demonstrates that damages were readily calculable prior to trial.

The trial court did not err in awarding prejudgment interest to SMUD.

APPEAL BY SMUD

IX

Denial of SMUD's Motion for Attorney Fees

SMUD's sole issue on cross-appeal concerns the trial court's denial of its motion for contractual attorney fees.[11] SMUD acknowledges that the construction contract does not provide for attorney fees, but argues that the fee-shifting clause in the surety bond contract compels Fru-Con to pay for the litigation. SMUD further contends Fru-Con is bound by its judicial admission that the construction contract provides attorney fees for the prevailing party. We reject SMUD's arguments.

A.

The Trial Court's Denial of Contractual Attorney Fees

In its complaint, SMUD did not allege that the construction contract had a fee-shifting provision. SMUD requested attorney fees be awarded only for its cause of action under the False Claims Act. Thus, SMUD's complaint sought only statutorily authorized attorney fees.

By contrast, Fru-Con's first amended cross-complaint asserted that attorney fees were available under the

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[11] Even though SMUD prevailed on its cause of action under the False Claims Act, it presents no argument that it is entitled to attorney fees under Government Code section 12651, subdivision (a)(1).

construction contract. Specifically, paragraph 61 of Fru-Con's operative cross-complaint stated: "*The Contract allows for the recovery of attorneys' fees by the prevailing party in litigation to enforce the Contract*. Fru-Con has engaged legal counsel to enforce the Contract against SMUD and is, therefore, entitled to an award of attorneys' fees according to proof." (Italics added.) In its prayer for relief, Fru-Con requested contractual attorney fees.

SMUD filed an answer that denied "both generally and specifically each and every allegation in the first-Amended Cross-Complaint of Fru-Con Construction Corporation . . . ."

SMUD never amended its complaint or answer to allege that the construction contract included a fee-shifting provision. Nonetheless, SMUD moved for contractual attorney fees after securing a favorable jury verdict. The trial court denied SMUD's motion, concluding that the construction contract did not have a fee-shifting clause and that the surety bond contract provided attorney fees only to enforce the surety bond. Judgment was entered accordingly.

B.

Contractual Attorney Fees without a Fee-Shifting Provision

Challenges to the amount of attorney fees awarded by the trial court are ordinarily reviewed for abuse of discretion. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894.) Here, SMUD does not challenge the amount

of fees, but the trial court's determination that SMUD was not entitled to fees under any agreement between the parties. Such a "'determination of the legal basis for an award of attorney fees' is a 'question of law' which the reviewing court will examine de novo." (*Ibid.*, quoting *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.)

Our review of the record leads us to conclude that the trial court properly denied SMUD's motion for attorney fees. The construction contract between SMUD and Fru-Con did not contain a fee-shifting provision. So too, none of the documents incorporated into the construction contract -- such as the schedule of payments, lists of materials costs, and certificates -- contains a fee-shifting provision. SMUD does not deny that the construction contract lacks a fee-shifting clause and looks to another agreement for fees.

SMUD purports to find a fee-shifting clause in the surety bond contract that SMUD argues is applicable to its action on the construction contract. In pertinent part, the surety bond contract provides: "Whenever Contractor shall be, and declared by Obligee [SMUD] to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety may promptly remedy the default in any way acceptable to the Obligee. In the event suit is brought upon this bond by the Obligee and judgment is recovered, the Surety shall pay all

costs incurred by the Obligee in such suit, including a reasonable attorney's fee to be fixed by the Court."

The question of whether the surety bond contract's fee-shifting clause covers actions on the construction contract requires us to construe the language of the surety bond contract. "'The goal of contractual interpretation is to determine and give effect to the mutual intention of the parties.' (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 763; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Thus, a 'court's paramount consideration in construing [a] stipulation is the parties' objective intent when they entered into it.' (*Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341; accord, *Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1352; *Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1240.) 'That intent is to be inferred, if possible, solely from the written provisions of the contract.' (*Pardee*, at p. 1352.)" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 525.)

The surety bond contract does provide for attorney fees, but limits fees to actions "brought upon this bond . . . ." We may not ignore the express limitation on fee shifting stated in the surety bond contract. "If possible, we should give effect to every provision and avoid rendering any part of an agreement

surplusage." (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633.) Here, the bond's constraint on fee shifting precludes the application of the fee clause to actions on the construction contract.

SMUD argues that, notwithstanding the language of the bond, the surety bond "was expressly required by and is a necessary part of the Construction Contract transaction. The Construction Contract and Performance Bond are part and parcel of the same contract." On this point, SMUD points out that Civil Code section 1717 renders fee-shifting clauses reciprocal and applicable to the entire contract. (See *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968 (*Myers Building Industries*).) Under Civil Code section 1717, a party that has not signed a particular agreement may nonetheless be entitled to attorney fees under the agreement if it was sued under the agreement and would have been liable for attorney fees had it lost. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds Metals*).) SMUD would thus have us incorporate the fee-shifting provision from the surety bond into the construction contract.

Although SMUD required a surety bond to ensure completion of the power plant, SMUD did not require a fee-shifting agreement. The parties to the bond had the prerogative to agree to a fee-shifting provision that would apply only to the enforcement of the bond. Fru-Con and Travelers were not

required to extend a fee-shifting provision to the construction contract. Even though SMUD would have been entitled to attorney fees if it had been sued and prevailed in an action *on the surety bond*, SMUD does not thereby become entitled to attorney fees in its action *on the construction contract.* (Cf. *Reynolds Metals, supra*, 25 Cal.3d at p. 128 [fees are available to nonsignatory in actions founded on a contract that has a fee-shifting agreement].) Civil Code section 1717 does not aid SMUD because SMUD may not borrow a fee-shifting agreement from the surety bond that was limited only to actions on the bond.

SMUD next argues that Fru-Con should be bound by its pleadings. As SMUD points out, Fru-Con requested attorney fees in its answer to SMUD's complaint and alleged that the construction contract provided for attorney fees in its first amended cross-complaint. SMUD asserts that Fru-Con would surely have sought attorney fees had it prevailed on its cross-claims or on its defenses to SMUD's claims for damages.

SMUD's argument seeks to hold Fru-Con to the allegations made in its pleadings. Parties are generally bound by their pleadings because "[f]acts established by pleadings as judicial admissions '"are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted by the party whose pleadings are used against him or her." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 10:147,

p. 10-49.)'" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) In essence, the argument seeks to estop Fru-Con from denying the existence of a fee-shifting provision in the construction contract that Fru-Con itself pled as a fact.

We conclude that Fru-Con's pleading of entitlement to contractual attorney fees does not overcome the fact that the construction contract does not have a fee-shifting provision. "While it is true that [the defendant] requested attorney's fees under the contract in its cross-complaint against [plaintiff], mere allegation of a contractual right to attorney fees is not sufficient to create an estoppel where [the defendant] would not *actually* have been entitled to attorney fees under the contract if [the defendant] had prevailed." (*Myers Building Industries, supra*, 13 Cal.App.4th at p. 962, fn. 12.)

In sum, we decline to enforce a nonexistent contractual fee-shifting provision in the construction contract. We also will not render language in the surety bond contract mere surplusage by ignoring its express limitation. The trial court did not err in denying SMUD's motion for contractual attorney fees.

DISPOSITION

The judgment against Fru-Con Construction Corporation and the order denying Sacramento Municipal Utility District's motion for attorney fees are affirmed. Sacramento Municipal Utility District is entitled to its costs attributable to defense

against Fru-Con's appeal -- except that it may recover only one-third of the cost of its appendix, which this court finds excessive. (Cal. Rules of Court, rule 8.278(a)(1) & (5); see also rule 8.124(b)(3)(A) [providing that an appendix "must not" contain documents "that are unnecessary for proper consideration of the issues"].) FCC Corporation, formerly named Fru-Con Construction Corporation, shall bear its own costs. (Cal. Rules of Court, rule 8.278(a)(5).)

HOCH, J.

We concur:

RAYE, P. J.

ROBIE, J.